

No. 10251

United States
Circuit Court of Appeals
For the Ninth Circuit.

2317

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 458

FILED

OCT 12 1942

PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court of the United States
for the District of Arizona.

No. 10251

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD:

MESSRS. DARNELL & ROBERTSON,
410-13 Valley National Building,
Tucson, Arizona.
Attorneys for Appellants.

LESLEY B. ALLEN, Esquire,
37 North Church Street,
Tucson, Arizona.
Attorney for Appellee. [3*]

In the United States District Court
For the District of Arizona
Civil Action, File No. 54-Tuc.

EDWARD J. DONOVAN,

Plaintiff,

vs.

DAVID C. JEFFCOTT and
ELSIE JEFFCOTT, his wife,
Defendants.

ANSWER

Come now the above named defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and for answer to plaintiff's complaint herein filed, deny and allege as follows:

*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

Admit the allegations contained in paragraph I of plaintiff's complaint.

II.

Admit the allegation contained in paragraph II of plaintiff's complaint, except that the allegation that said plaintiff was giving specialized attention to surgical conditions of infancy and childhood, and as to such allegation said defendants do not have sufficient information upon which to form or express any opinion or belief and therefore require strict proof of such allegation.

III.

Admit the allegation contained in paragraph III of plaintiff's complaint in that in the course of such employment plaintiff made a trip to Tucson, Arizona, on April 1st, 1939, examined said infant and had consultations with the attending physicians of such infant on the 2nd day of April, 1939, and operated upon said infant upon said 2nd day of April, 1939, for certain intestinal obstruction. Said defendants deny that said plaintiff remained in Tucson, Arizona, in attendance upon such [4] infant until its condition became entirely satisfactory, and in that connection allege that said plaintiff left the City of Tucson, Arizona, on the morning of April 3rd, 1939, while said infant was still in an extremely critical condition and that other physicians and surgeons employed by said defendants continued administering treatment to said infant for a period of several weeks subsequent to said date. That in

truth and in fact said infant has never fully recovered and additional future surgical attention must be administered to said child.

IV.

Admit the allegations contained in paragraph IV of plaintiff's complaint to the effect that the condition of such infant prior to such operation was very critical in that it necessitated the performance upon such infant at a very tender age of a difficult, delicate and dangerous surgical operation. Said defendants do not have sufficient information upon which to form or express any opinion or belief as to the special training and experience of the plaintiff in performing the particular operation needed by such infant, or the qualifications of said plaintiff to perform such an operation, and in that connection require full proof of such allegations. Said defendants deny that under the circumstances the professional services provided to the infant son of said defendants, as alleged in said complaint, were of the reasonable value of \$12,500.00, and in that connection said defendants allege that said sum is extremely excessive, unreasonable and exorbitant.

V.

Admit the allegations contained in paragraph V of said plaintiff's complaint that said defendants have paid to said plaintiff the sum of \$2,500.00, but deny that said defendants owe said plaintiff the sum of \$10,000.00, or any other sum of money, and that said sum of money is not a reasonable value of such professional services. [5]

VI.

Said defendants deny each and every other allegation, matter and thing in said complaint contained, except for the portions thereof which have been expressly hereinbefore admitted.

VII.

By way of further answer to said complaint, said defendants allege that the sum of \$2,500.00 was paid by said defendants to said plaintiff on condition that the same be accepted as full accord and satisfaction of the sums of money owing by said defendants to said plaintiff and that said plaintiff accepted said sum of money and thereby released, settled and satisfied all claims held by said plaintiff against said defendants, or either of them. Said defendants allege that the said sum of \$2,500.00 so paid to said plaintiff represented a fair and reasonable fee for the service performed by said plaintiff.

Said defendants further allege that at the time of employment of said plaintiff no agreement was made as to any specific charge that said plaintiff would make for his services to be rendered and that there has never been an account stated between said parties.

Wherefore, said defendants pray that said plaintiff have and recover nothing against said defendants, or either of them, and that they be awarded

judgment against said plaintiff for their costs herein incurred.

DARNELL, PATTEE &
ROBERTSON,
By LAWRENCE V. ROBERTSON,
410 Valley National Building,
Tucson, Arizona,
Attorneys for Defendants
David C. Jeffcott and Elsie
Jeffcott, his wife. [6]

Copy received this 30th day of September, 1940.

LESLEY B. ALLEN
Attorney for Plaintiff
Edward J. Donovan.

[Endorsed]: Filed Sep. 30, 1940. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the above named plaintiff, Edward J. Donovan, complaining of the said defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and alleges:

I.

That the said plaintiff is a resident of the State of New Jersey;

That the said defendants are both residents of the State and District of Arizona; and

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000).

II.

That, on or about the 1st day of April, 1939, the said defendants, while acting jointly and severally and through their duly authorized agent or agents at Tucson, Arizona, did employ the said plaintiff, who was then engaged at the City and State of New York in professional practice as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood, to come to Tucson, Arizona, within the District aforesaid, by airplane for the purpose of performing a surgical operation upon Robert Jeffcott, the infant son of defendants.

[8]

III.

That, in the course of such employment, plaintiff made a trip to Tucson, Arizona, on or about April 1, 1939, examined the said infant and had consultations with the attending physicians of such infant on the 2nd day of April, 1939, operated upon such infant on such 2nd day of April, 1939, for intestinal obstruction, and remained in Tucson, Arizona, in attendance upon such infant, until its condition became entirely satisfactory.

IV.

That the condition of such infant, prior to such operation, was very critical, in that it necessitated the performance upon such infant, at a very tender

age, of an extremely difficult, delicate and dangerous surgical operation;

That plaintiff, on and prior to such 2nd day of April, 1939, had had special training and experience for and in the performing of the particular operation needed by such infant, which gave plaintiff unusual and eminent qualifications for the performing of such operation; and

That, under such circumstances, the said professional services, provided to the infant son of defendants as hereinabove alleged, were of the reasonable value of Twelve Thousand and Five Hundred Dollars (\$12,500.00).

V.

That defendants have paid to plaintiff the sum of Two Thousand Five Hundred Dollars (\$2,500.00); and that defendants now owe to plaintiff the sum of Ten Thousand Dollars (\$10,000.00), balance of such reasonable value of such professional services.

Wherefore plaintiff demands judgment against the said defendants for the sum of Ten Thousand Dollars, interest and costs.

LESLEY B. ALLEN,

Attorney for Plaintiff. [9]

I hereby acknowledge receipt of copy of the attached Amended Complaint and consent that the same may be filed by plaintiff, all on this 28th day of January, 1942.

LAWRENCE V. ROBERTSON
of counsel for defendants.

[Endorsed]: Filed Jan. 28, 1942. [10]

PLAINTIFF'S EXHIBIT No. 1

New York, May 1, 1939.

Mr. David Jeffcott,
Patagonia,
Arizona.

To EDWARD J. DONOVAN, M.D.

424 Park Avenue

For Professional Services Operation on Baby Jeff-
cott in Tucson, \$12,500.

Received Payment

[Endorsed]: Admitted and filed Jan. 29, 1942. [11]

PLAINTIFF'S EXHIBIT No. 2

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

May 22, 1939.

Dr. Edward J. Donovan

424 Park Avenue

New York, N. Y.

Dear Dr. Donovan:

Since receiving your statement for \$12,500.00, I have given the matter much careful thought and want to present certain of my reactions for your consideration.

First, I want to express the deep appreciation of myself and my wife for the wonderful service you

have rendered us. Service of this kind cannot be measured in terms of money and we hope you will not misunderstand the true reasons for writing you this letter.

We are not very familiar with the way in which the fee for a service of this kind is determined. However, it is our impression that the fee is to some extent, at least, governed by the ability of the patient to pay, and we feel that perhaps you have misunderstood, or you have been misinformed, as to our financial status. Therefore, we want to give you a brief outline of our position.

Somewhat over a year ago we purchased a cattle ranch and started in the livestock business. The value of our real estate, cattle and equipment totals roughly about \$150,000.00. Against this total we owe a debt of about \$50,000.00 which must be retired over a period of about 15 years. This investment constitutes our entire wealth except for a few minor assets totaling not over \$2500.00.

Our entire income is derived from the sale of cattle produced on the ranch and since we are now just in process of building up our herd, sales will be small for several years. Our gross income for 1939 will not exceed \$8000.00 against which will be operating costs amounting to about \$11,000.00. Hence, we will have to borrow this year an additional amount of \$3,000.00 in addition to our family living expense. Within three years our net income will probably reach about \$5000.00 and there is no probability of its exceeding [12] \$8000.00 at any fu-

ture date. From this net income we must meet our living costs and retire the above mentioned indebtedness.

You are no doubt aware of the fact that serious complications followed the operation which necessitated holding the baby in the hospital for over six weeks. The care of my wife was nominal, but the medical fees, nurses, *hopital*, etc. on the baby alone already exceed \$2500.00 and it is still necessary to retain a nurse—and this will continue for some time to come.

You can readily see that we have a financial burden which worries us greatly.

We desire to meet our obligations as promptly as is possible within our ability to pay, but we would appreciate greatly hearing from you further and to have your reactions in the light of the above information.

We will be glad to furnish you with a detailed financial statement or to give you any further information you may care to request.

Sincerely yours,

DAVID C. JEFFCOTT.

[Endorsed]: Admitted and Filed Jan. 29, 1942.

[13]

PLAINTIFF'S EXHIBIT No. 3

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

August 14, 1939.

Dr. Edward J. Donovan

424 Park Avenue

New York, New York

Dear Dr. Donovan:

Dr. Hamblin has advised me of the results of the meeting you suggested, but while I appreciate your offer to reduce your bill to \$7500—it is just as impossible for me to meet as your original figure.

From what Dr. Hamblin writes you are under a misapprehension on several points:

First: that there were numerous opportunities for me to have talked over the fee with you in Tucson. Funny you should feel that way when I, on the other hand, felt hurt that we hadn't been able to have a talk with you. I wanted to meet you at the plant at your arrival, but the doctors here would not allow it. If you will remember, the only time I saw you was shortly after the operation when you were in conference with the other doctors present, with whom you had engagements for the rest of the day. You had planned to leave Monday night and I arranged to be back from the ranch to see you Monday morning, but upon my arrival found to my disappointment that you had already left.

Second: as to the size of the room in which you found the baby, the Desert Sanatorium has no nursery and when there is an obstetrical case an empty room is given over to the baby and no charge made for it. The day before you arrived we were told he must be moved to a room at the other end of the building where his constant crying would not disturb very ill patients nearby, and where they would not be annoyed by the general activity in and out of his room day and night. And as to the two nurses at a time, the doctors claimed it was imperative because of the intravenous and all the other administrations to keep him alive and to get him in shape for the operation, and I am [14] sure they will not agree with you they were unnecessary. They also looked after the mother.

Third: of course my wife would have been glad to have saved the expense of the nurse coming home with the baby but being inexperienced in operations she naturally felt she had to take the advice of the Sanatorium's doctors who were in charge of the baby. We both agree with you that it was a needless expense and immediately we realized it we dispensed with her services.

Also, if I had been more experienced I would surely have had your fee settled in advance, to learn if I could afford it, instead of taking the recommendations of the local doctors—but even at that I can hardly be blamed for not anticipating what it

proved to be when a number of the highest standing members of the profession in Tucson with whom the matter has been discussed differ so much from your ideas. Their opinions varied as to what your bill should be but the highest figure of any was \$2500, and all agreed that the top figure a lawsuit out here would bring was not more than that.

I feel very unhappy that any question of cost should enter into what you did for our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it I would like to do some more for you in order that you would think as well of us as we did toward you.

Hoping you can see this matter as we do I am,

Yours sincerely,

DAVID C. JEFFCOTT. [15]

[Endorsed]: Admitted and filed Jan. 29, 1942. [16]

PLAINTIFF'S EXHIBIT No. 4

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

March 2, 1940

Mr. Arthur T. Schmidt

92 Liberty Street

New York, N. Y.

Dear Sir:

Because it seemed to me that my letter of August 14th last fully covered the matter, and because I wanted to think the matter over further, I failed to reply to your letter of December 6th last. Your letter of February 10th seems to intimate that my August 14th letter was not clear. Of course I want the matter amicably adjusted—that was the reason for my sending Dr. Donovan check for \$2500, when my advisors were telling me that such an amount was a considerable overcharge.

To set you right on the matter—the only reason that Dr. Donovan was asked to come was because he was recommended by two Doctors at the Desert Sanatorium who had worked under him. Undoubtedly there were others nearer and even on the Coast who could have done the same thing, but not personally knowing them I accepted the recommendations of the San. Doctors.

Contrary to your advice there was no feeling that the child couldn't go to New York or elsewhere, but it seemed easier and more satisfactory for the Doc-

tor to come here than for the child and a nurse to go to the Doctor.

Your mention of the hazard of travel by air is not borne out by the accident Insurance Companies' experience—they find it safer than travel by automobile—and I assume Dr. Donovan does not eschew the automobile because of its hazard. My Mother travels out here by air in preference to train and greatly enjoys it.

My suggestion that if things came my way sometime I would do more for Dr. Donovan was due solely to my desire to have Dr. Donovan's goodwill by coming nearer to his ideas—my own ideas are that the check I sent was ample. [17]

I expect to give Dr. Donovan the opportunity for another fee when in due course the time comes to operate on the boy again for the fistula and the hernia which resulted from the operation.

As I explained to Dr. Donovan I am a young man in process of trying to make a livelihood for my family and am heavily in debt to my Father and Mother, and have done all I can feel I should in this matter—and I suggest that Dr. Donovan would be showing the right spirit in deciding **not only to live—but to let live**. And I and others will be disappointed in him if he doesn't.

Yours truly,

DAVID C. JEFFCOTT.

[Endorsed]: Admitted and filed Jan. 29, 1942. [18]

PLAINTIFF'S EXHIBIT No. 5

ARTHUR T. SCHMIDT

Attorney at Law

92 Liberty Street, New York

Rector 2—6292

December 6th, 1939

Mr. David C. Jeffcott,
Rail X Ranch,
Patagonia, Arizona.

My Dear Mr. Jeffcott:

Dr. Edward J. Donovan has conferred with me regarding the unfortunate situation which has arisen out of the facts connected with the recent operation performed upon your infant son. Dr. Donovan believes that the matter has reached a point where both you and he are desirous of concluding some satisfactory settlement and feels as I do that the situation has occurred due to a misunderstanding of the whole picture. He has asked me to communicate with you for the sole purpose of trying to bring about an amicable and pleasant settlement of the matter. With this purpose in mind, I think it would not be amiss if I review the fundamental facts involved, believing that a third party can often obtain a more accurate picture than the individuals who are interested and involved in the issues.

The condition of your son at the time that the operation became necessary was, I am informed, an unusual one and only a very limited and select

group of surgeons had had any experience with such a situation. Of this group, it is my belief, obtained from sources other than Dr. Donovan, that he was the most successful and eminent. The desire of your doctor and of yourself to have the very best specialist and surgeon perform this operation is not only easily understood but it is decidedly commendable. I feel as you have expressed yourself in one of your letters that the life of your infant son cannot be measured in figures and I have no doubt that you still feel that the choice of surgeon which you made was a wise one. The baby's condition was such that immediate action had to be taken and was so precarious that you did not feel that it was safe to bring the patient to New York and you therefore requested Dr. Donovan to come to Arizona forthwith. Your decision to do this I have no doubt was a difficult one and probably is responsible for saving your son's life. Pursuant to your request Dr. Donovan [19] flew to Arizona. The hazard connected with a flight for a man of Dr. Donovan's preeminence and for the further reason that he has a considerable family of his own was certainly not one that he would ordinarily be expected to take and must have met at the time at least with a feeling of appreciation by you and your family. The operation was a success and due to Dr. Donovan's expeditious flight was timely.

The fee that Dr. Donovan charged in this matter is one that he deemed fair and is one that several disinterested surgeons in this city deem entirely

proper. I note that you have paid the sum of \$2500. with the statement that the consensus of opinion of the doctors in your vicinity seems to fix that amount as a proper fee and with the further statement that if in the future you are in a position to pay more you will do so. The fact that the local doctors have led you to this opinion must have been of importance to you in making this decision but the fact remains that it was not your desire that any of these surgeons should perform the operation but that you did desire the best available surgeon to do so. I do not believe that the opinion of these doctors as to the value of the services rendered should be a controlling force. The further fact that you state that when you are in a position to do more you would do so would seem to indicate that you also feel that Dr. Donovan has not received proper compensation. It may be that you are measuring Dr. Donovan's services by your ability to pay at the present moment rather than by the actual value of the services rendered and of your son's health. I come to this conclusion from the tenor of your letters.

I believe that with a fair approach to this problem a satisfactory solution to all involved can be reached, and if the want of immediate finances is the obstacle may I suggest that perhaps some arrangement can be made for payment of this bill in such reasonable installments spread over such a period of time as would be satisfactory to both parties.

This letter considerably longer than I originally

intended and I must attribute its undue length to the fact that I am extremely desirous of reaching a friendly solution to the matter and I hope you will approach the problem with the same mind. It seems to me that if you keep in mind [20] the facts which affect each side of this discussion a spirit of fairness will point the way to the solution.

Trusting that I shall hear from you in the very near future with your suggestions regarding the same, I am,

Sincerely yours,

ARTHUR T. SCHMIDT.

ATS:mvd

[Endorsed]: Admitted and filed Jan. 29, 1942. [21]

[Title of District Court and Cause.]

STIPULATION IN RE PLAINTIFF'S
EXHIBIT No. 6

It Is Hereby Stipulated between the undersigned attorneys for the respective parties herein that this stipulation be incorporated in the record on appeal of this cause in lieu of plaintiff's Exhibit No. 6 in evidence, for the reason that it is impracticable for said Exhibit to be printed as a part of said record in view of the many pictures, diagrams and drawings that are contained in said Exhibit.

Plaintiff's Exhibit No. 6 is a pamphlet containing a reprinted article from the American Journal

of Diseases of Children published in January 1939, which is entitled "Disturbances of Rotation of the Intestinal Tract" and written by Rustin McIntosh, M.D. and Edward J. Donovan, M.D. The pamphlet sets forth the observations of the two authors of twenty cases where there were disturbances of rotation of the intestinal tract. Pictures of these various cases, x-ray prints and drawings are set forth in conjunction with each of these cases. A diagnosis, discussion of treatment and comments of the authors are made in connection with each of said cases. The authors also generally discuss the symptoms, operative treatment and other phases of disturbances of rotation of the intestinal tract.

It Is Hereby Further Stipulated that plaintiff's Exhibit No. 6 be not transmitted to the Clerk of the Circuit Court of [22] Appeals at the time the transcript of record is forwarded.

Dated this 31st day of July, 1942.

LESLEY B. ALLEN,
37 North Church,
Tucson, Arizona,
Attorney for Plaintiff.

DARNELL & ROBERTSON,
410 Valley National Building,
Tucson, Arizona,
Attorneys for Defendants.

By LAWRENCE V. ROBERTSON,
Member of the Firm.

[Endorsed]: Filed Aug. 19, 1942. [23]

PLAINTIFF'S EXHIBIT No. 7
THE DESERT SANATORIUM
of
SOUTHERN ARIZONA
April 29, 1939

Tucson

Dr. Edward J. Donovan
424 Park Avenue
New York City

Dear Doctor Donovan:

Baby Jeffcott continues to improve. His weight is now seven pounds, eight ounces. There has been no fecal drainage and only a very small amount of fluid coming from his wound in the past 24 hours.

Yours sincerely,

HUGH C. THOMPSON, JR.,
(M.D.)

Associate Physician.

[Endorsed]: Admitted and filed Feb. 3, 1942. [24]

PLAINTIFF'S EXHIBIT No. 8

THE DESERT SANATORIUM

of

SOUTHERN ARIZONA

April 26, 1939

Tucson

Dr. Edward J. Donovan

424 Park Avenue

New York, N. Y.

Dear Doctor Donovan:

Your letter of April 24th has been received. Baby Jeffcott has made very excellent progress during the past week. He has gained about one pound, is taking feedings well and without any vomiting, and is having normal stools. The fistula is steadily decreasing in size and now admits a probe only with difficulty. As far as I can see, there is no mucosa present in the wound. The amount of drainage from the wound is very small compared to what it formerly was. We are all very encouraged about him.

The name of the baby's father is David Jeffcott and his address is Patagonia, Arizona.

I extend my personal regards to you and my other friends in New York.

Yours sincerely,

HUGH C. THOMPSON, Jr.,

Associate Physician.

Enclosure

[Endorsed]: Admitted and filed Feb. 3, 1942. [25]

DEFENDANT'S EXHIBIT A

DAVID C JEFFCOTT—RAIL X RANCH
FINANCIAL TOTALS 2/2/42—DJ.

	1937	1938	1939	1940	1941
Income from Ranch Sales	25.00	3,758.37	6,183.61	11,548.06	16,585.34
Increase In Cattle Inventories			10,749.21	3,010.04	9,574.82
Total Increase & Income	25.00	3,758.37	16,932.82	14,558.10	26,160.16
Ranch Expenses	3,584.86	18,330.74	17,362.91	16,341.60	27,491.49
Losses	3,559.86	Loss 14,572.37	Loss 430.09	Loss 1,783.50	Loss 1,331.33
Dividends		403.22	130.00	130.00	90.00
Personal Expenses		15,572.72	12,983.47	6,305.32	6,277.82
		(5,517.57—Inc tax)			
Cattle Purchases	30,312.50	13,362.64			

[Endorsed]: Admitted and filed Feb. 2, 1942. [26]

In the United States District Court
For the District of Arizona

November 1941 Term

At Tucson

Minute Entry of

MONDAY, MARCH 23, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ-54

[Title of Cause.]

It Is Ordered that defendants' objections to the depositions of plaintiff's expert witnesses, Dr. Downs, Dr. Burdick and Dr. Beekman, and the questions therein propounded and the answers thereto be overruled, and

It Is Ordered that plaintiff's objections to the foundational and hypothetical questions propounded to defendants' expert witnesses, Dr. Carrol, Dr. Gore and Dr. Holbrook, be overruled.

It Is Further Ordered that judgment be entered for the plaintiff and against the defendants as follows: amount of fees allowed plaintiff, \$7,500.00; credit by payment thereon \$2,500.00; recovery \$5,000.00, and

It Is Ordered that counsel prepare and submit findings of fact and conclusions of law and form of judgment. [27]

NOTICE TO COUNSEL OF JUDGMENT

DEPARTMENT OF JUSTICE
UNITED STATES DISTRICT COURT

Office of the Clerk
District of Arizona
Tucson, Arizona

March 23, 1942

Leslie B. Allen, Esq.
Hoff Building,
Tucson, Arizona

Messrs. Darnell, Pattee & Robertson,
Valley National Building,
Tucson, Arizona

Re: Civ-54-Tucson, Edward J. Donovan
vs. David C. Jeffcott, et ux.

Gentlemen:

You are advised that the court today ordered in the above entitled case that defendants' objections to the depositions of plaintiff's expert witnesses Dr. Downs, Dr. Burdick and Dr. Beekman and to the questions therein propounded and the answers thereto be overruled; that plaintiff's objections to the foundational and hypothetical questions propounded to defendants' expert witnesses Dr. Carroll, Dr. Gore and Dr. Holbrook be overruled; that judgment be entered for plaintiff and against defendants,—amount of fees allowed plaintiff, \$7500.00; credit by payment thereon, \$2500.00; recovery,

\$5000.00; counsel to prepare and submit findings and form of judgment.

Very truly yours,

EDWARD W. SCRUGGS,

Clerk

By HUGH M. CALDWELL,

Hugh M. Caldwell, Deputy [28]

[Title of District Court and Cause.]

FINDINGS OF FACT; CONCLUSIONS OF LAW AND ORDER DIRECTING JUDGMENT

The Above Entitled Cause having come on regularly for trial before the above entitled court, upon the facts and without a jury, on the 29th day of January, 1942; the said cause having been tried by the court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and upon the 2nd and 3rd days of February, 1942; and said cause having been taken under advisement by the said court on the said 3rd day of February, 1942, Now, Therefore,

The Court Does Find the Facts, specially, as follows:

I.

That the plaintiff, Edward J. Donovan, was a resident of the State of New Jersey at the time he filed his complaint herein;

II.

That the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, were both residents of the State of Arizona at the time of the filing of such complaint;

III.

That the matter in controversy in such action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

IV.

That, for a long period of time prior to and including the 31st day of March, 1939, said plaintiff had been engaged, at the City and State of New York, in professional practice as a [29] physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood;

V.

That, on or about the 31st day of March, 1939, Robert Jeffcott, the infant son of said defendants, then being about seven days old, was diagnosed by his attending physicians, at Tucson, Arizona, as suffering from a complete intestinal obstruction.

VI.

That, on or about such 31st day of March, 1939, the said attending physicians of such infant decided that a surgeon having specialized and outstanding training, experience and skill, in performance of the operation for correction of intestinal obstruction

in the newborn, should be employed by defendants to operate upon the said Robert Jeffcott;

VII.

That such attending physicians, then and thereupon, suggested to defendants that they employ plaintiff to perform such operation upon the infant son of defendants;

VIII.

That defendants, thereupon and on or about said 31st day of March, 1939, instructed Dr. Hugh C. Thompson, one of such attending physicians of such infant, to act on their behalf in employing plaintiff to perform such operation upon their said son.

IX.

That the said Hugh C. Thompson, then and pursuant to such instructions, arranged that plaintiff would perform such operation upon such infant at Babies Hospital in New York City on the 1st day of April, 1939, it being contemplated and arranged that such infant, accompanied by necessary medical and nursing attendants, should be flown to New York City by airplane.

X.

That, shortly thereafter and on said 31st day of March, 1939, [30] the said defendants advised the said Hugh C. Thompson that they desired and were instructing him to make further employment arrangements with plaintiff, under which plaintiff should fly forthwith to Tucson, Arizona, in order to perform such operation there instead of at New York

City; and that defendants did then advise the said Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff;

XI.

That the said Hugh C. Thompson, pursuant to such instructions and on said 31st day of March, 1939, did negotiate with plaintiff the second time, relative to his employment by defendants, did advise him that defendants desired that he fly forthwith to Tucson, Arizona, to perform such operation, and, in connection therewith, did advise plaintiff that defendants had stated that money was no object;

XII.

That plaintiff thereupon accepted such employment by defendants and agreed to proceed to Tucson, Arizona, by airplane, and to operate upon such infant at Desert Sanatorium, Tucson, Arizona, where such infant was then hospitalized;

XIII.

That such defendants desired and negotiated such change in the employment of plaintiff because they felt that plaintiff's coming to Tucson, Arizona, to there perform such operation, would disturb the orderly routine of fewer people;

XIV.

That, pursuant to such employment and on said 31st day of March, 1939, plaintiff departed from

State of New Jersey by airplane and arrived at Tucson, Arizona, during the forenoon of Sunday, the 1st day of April, 1939;

XV.

That, after arriving at Tucson, Arizona, and on said 1st day [31] of April, 1939, plaintiff examined such infant and the available X-rays, held consultations with the attending physicians of such infant and performed an abdominal operation upon such infant for the correction of intestinal obstruction;

XVI.

That, in the course of performing such operation, plaintiff did find and diagnose that such infant was suffering from congenital malformation of the intestinal tract and from malrotation of the small intestine, resulting in complete obstruction;

XVII.

That, in the course of performing such operation, plaintiff did correct such condition of malformation, malrotation and obstruction by bringing the cecum of such infant down to its normal position, by cutting away a band on the ileum of such infant, by untwisting the volvulus and turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, by attaching the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen, where it belonged, and by closing the abdomen in layers;

XIX.

That, upon completion of such operation, plaintiff caused such infant to be immediately transfused and then to be given a continuing infusion of glucose and saline until infusion was no longer needed;

XX.

That plaintiff thereafter remained at Tucson, Arizona, in continued attendance upon such infant, for approximately twenty-four hours and until it had become apparent to plaintiff that such infant no longer required his specialized surgical care;

XXI.

That plaintiff then returned to New Jersey by airplane and arrived at his New York office during the afternoon of April 3, 1939; [32]

XXII.

That plaintiff thereafter communicated with and extended advice to said Hugh C. Thompson, one of the attending physicians of such infant, in the course of post-operative care;

XXIII.

That such operation was successful in correcting such obstruction, in that such infant survived such operation with apparent normal functioning of the intestinal tract;

XXIV.

That such operation was successful in correcting such congenital malformation, in that an X-ray of

the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position;

XXV.

That the matter of the amount to be charged by plaintiff for his professional services in performing such operation was not discussed by plaintiff and the said Hugh C. Thompson in the course of the said negotiations for the employment of plaintiff;

XXVI.

That the amount to be charged by plaintiff for such professional services was not discussed by plaintiff and defendants at any time prior to rendition of statement, by plaintiff to defendants, on or about May 1, 1939;

XXVII.

That the condition of such infant, prior to such operation, was very critical, in that it necessitated the performance upon such infant, at a very tender age, of an extremely difficult, delicate and dangerous surgical operation;

XXVIII.

That said plaintiff, prior to said 1st day of April, 1939, had had special and extensive training and experience in caring for surgical conditions of infancy and childhood, had had an unusual [33] and outstanding degree of experience in performing the operation, upon newborns and infants, for correction of complete intestinal obstruction, and had attained

some national recognition and prominence in such field of pediatric surgery;

XXIX.

That the said defedants, at the time of employment of said plaintiff and at the time of the performance of such operation, were of substantial worth;

XXX.

That the personal expenditures of such defendants, for the year 1939, were in excess of Twelve Thousand Dollars, and, for the year 1938, were in excess of Fifteen Thousand Dollars;

XXXI.

That the reasonable value of the said professional services of plaintiff, in performing such operation upon the infant son of such defendants under such circumstances, amounts to the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and

XXXII.

That defendants have paid to plaintiff, on account of such professional services, the sum of Two Thousand Five Hundred Dollars (\$2,500.00).

Wherefore, the court does state separately its conclusions of law thereon, as follows:

I.

That the said court had and has proper and lawful jurisdiction of such cause;

II.

That the said Hugh C. Thompson was acting as the lawful agent for and on behalf of said defendants, and within the scope of his agency, in negotiating for and arranging the employment of plaintiff to operate upon the infant son of defendants at Tucson, Arizona, for the correction of intestinal obstruction; [34]

III.

That the amount to be charged by plaintiff, for his professional services in performing such operation, was not determined by any contract between plaintiff and defendants; and

IV.

That defendants, by virtue of such employment of plaintiff and by virtue of plaintiff performing such operation upon the infant son of defendants, became jointly and severally indebted to plaintiff in the amount of the reasonable value of the professional services of plaintiff, in accepting such employment and performing such operation, such reasonable value being in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and

The defendants having paid to plaintiff the sum of Two Thousand and Five Hundred Dollars (\$2,500.00) on account of such indebtedness,

The Court Hereby Directs that formal judgment be made and entered in such cause, in favor of plaintiff and against the defendants and each thereof, for the sum of Five Thousand Dollars (\$5,000.00),

together with interest thereon at the rate of six per cent (6%) per annum from entry of judgment until paid, and for plaintiff's costs herein expended, with like interest.

Made and Entered Herein this day of
....., 1942.

.....
Judge of United States Dis-
trict Court, District of
Arizona

The foregoing draft of findings, conclusions and order directing entry of judgment is respectfully filed herein this 25th day of March, 1942.

LESLEY B. ALLEN,
Attorney for plaintiff.

Copy received March 25, 1942.

DARNELL, PATTEE &
ROBERTSON
Of counsel for defendants.

[35]

[Endorsed]: Filed Mar. 25, 1942. [36]

[Title of District Court and Cause.]

REQUEST FOR FILING OF OBJECTIONS
AND AMENDMENTS TO FINDINGS OF
FACT AND FOR ORAL ARGUMENT

Request is hereby made that the objections and offered amendments to findings of fact heretofore filed by the defendants in the above entitled cause

be duly filed herein and that the same be set for hearing and settlement on Monday, April 6, 1942, at ten o'clock A. M. in the above court and that oral argument may be had in connection therewith.

Dated this 30th day of March, 1942.

Respectfully submitted,

DARNELL, PATTEE &

ROBERTSON,

By LAWRENCE V. ROBERTSON

ABBIE Y. HOLESAPPLE,

410 Valley National Building,

Tucson, Arizona.

Attorneys for Defendants.

Copy received this 30th day of March, 1942.

LESLEY B. ALLEN,

Attorney for Plaintiff.

By JOHN A. BRUNING

[Endorsed]: Filed Mar. 30, 1942. [37]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Come now the above named defendants and object to the proposed findings of fact submitted and filed by the above named plaintiff on the 25th day of March, 1942, as follows, to-wit:

I.

Object to that portion of Paragraph X of proposed findings of fact commencing on line 5 on page

3 and reading as follows, to-wit: "and that defendants did then advise said Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff;" This objection is made for the reason that it is contrary to the testimony of Mr. Jeffcott, which testimony was in substance that he told Dr. Thompson when he was asked if money was any object "nothing within reason."

II.

Object to Paragraph XI upon the ground that any representations made by Dr. Thompson to Dr. Donovan which were contrary to the authority given Dr. Thompson is not binding upon the defendants, even if Dr. Thompson be an agent of the defendants; the testimony in fact shows that Dr. Thompson was an independent contractor.

III.

Object to findings contained in Paragraph XIII for the reason that the same is immaterial and is contrary to the testimony of Mr. Jeffcott. The rea-

[38]

son for requesting Dr. Donovan to come to Tucson was because he thought it would be better for the baby and it would be no more expensive than to take the baby and attendants to New York.

IV.

Object to findings contained in Paragraph XXIX for the reason that the statement is a conclusion and does not fairly present the facts as to defendants' financial worth at the time of said employment.

These particular findings are the most important facts to be adduced from the testimony in the case as the reasonableness of the charge must be predicated upon these facts.

V.

Object to the findings contained in Paragraph XXX for the reason that the same are immaterial and for the additional reason that the facts as stated are misleading. The testimony of Mr. Jeffcott was that over Six Thousand Four Hundred Dollars (\$6,400.00) of his expenditures in 1939 was for medical and hospital fees and that his expenditures for 1938 were large in view of the fact that he was getting established on the ranch, was making improvements and repairs to the dwelling in which he lived, buying furniture and household appliances, incurred traveling expenses and other charges. All of these facts are immaterial as they were not figured in any way in showing the income from his assets. The fact that he also lost over Three Thousand Dollars (\$3,000.00) from ranch operations in 1939 did not include any of his personal expenses.

VI.

Object to the finding contained in Paragraph XXXI that the reasonable value of professional services of the plaintiff in performing such operation upon the infant son of such defendants under such circumstances amounts to the sum of Seventy-Five Hundred [39] Dollars (\$7,500.00) for the reason that said finding is contrary to law and to the facts

in the case, is disproportionate to the financial circumstances of the defendants and constitutes an unreasonable and excessive charge of the plaintiff. It constitutes a charge of over ten (10) per cent of the defendants' net worth for the services performed.

VII.

Defendants object to proposed conclusions of law No. II for the reason that the evidence shows that Hugh C. Thompson was acting as a doctor and an independent contractor at the time in question.

VIII.

Defendants object to that portion of conclusions of law No. IV commencing on line 12 and reading "the sum of Seven Thousand Five Hundred Dollars (\$7,500.00)" for the reasons that such conclusion is contrary to law and to the facts and evidence offered in the case and is unreasonable and excessive compensation for the services performed.

IX.

Defendants object to that portion of the courts order commencing on line 19 of page 7 and reading as follows: "for the sum of Five Thousand Dollars (\$5,000.00)" for the reason that said sum is excessive and unreasonable and is not sustained by the law or evidence in the case.

OFFERED AMENDED AND ADDITIONAL
FINDINGS OF FACT

I.

In lieu of Paragraph XXIX defendants request the court to find as follows: "That the said defendants at the time of such employment were engaged in building up a ranch property in southern Arizona which had been purchased approximately one year prior thereto, said ranch then being in its formative stage and having a gross value of approximately One Hundred Fifty Thousand Dollars [40] (\$150,000.00) subject to an indebtedness in the amount of Seventy-five Thousand Dollars (\$75,000.00); and that during the year of 1939 the operation expenses of the ranch not including the personal expenses of the defendants amounted to approximately Eleven Thousand Dollars (\$11,000.00) and the gross income from the operation of the ranch was approximately Eight Thousand Dollars (\$8,000.00); and that said defendants owned a few stocks and bonds which produced an income in 1939 of One Hundred Thirty Dollars (\$130.00); and that said defendants had no other assets or source of income; and that said ranch has been improved by said defendants to the point that in 1942 at the time of the trial of this case said ranch had a gross value of approximately One Hundred Ninety-eight Thousand Dollars (\$198,000.00) subject to mortgage indebtedness of approximately One Hundred Twenty-seven Thousand Dollars (\$127,000.00) and would produce a net income of approximately Five Thou-

sand Dollars (\$5,000.00), which said net income might be increased to a possible Eight Thousand Dollars (\$8,000.00) by the year of 1943.”

II.

Said defendants request an additional finding of fact to be No. XXXIII and read as follows, to-wit: “That the plaintiff’s gross earnings during 1939 amounted to Forty Thousand Eight Hundred Eighty-seven and 05/100 Dollars (\$40,887.05), which said earnings included the sum of Two Thousand Five Hundred Dollars (\$2,500.00) paid by the defendants herein.”

III.

Defendants request as an additional finding of fact to be No. XXXIV the following: “That the plaintiff had performed eighteen operations of the nature of that performed upon the Jeffcott baby and for which he had received the following compensation: fourteen no charge; one Two Hundred Fifty Dollars (\$250.00); one Three Hundred Fifty Dollars (\$350.00); one One [41] Thousand Dollars (\$1,000.00); one Two Thousand Five Hundred Dollars (\$2,500.00).”

IV.

Defendants request as an additional finding of fact to be No. XXXV the following: “That the financial ability of a patient to pay is used as one of the important elements to be considered in fixing a charge for professional services by surgeons and doctors in New York City and by surgeons and doctors in Tucson, Arizona.”

Wherefore, said defendants pray that the foregoing objections to plaintiff's offered findings of fact and conclusions of law be sustained and that the foregoing offered amendments to said findings of fact be granted, and that the court modify its decision herein by substantially reducing the amount to be determined as reasonable compensation for plaintiff's services, and for such other order in the premises as the court shall deem meet and just.

DARNELL, PATTEE &
ROBERTSON,
By LAWRENCE V. ROBERTSON
ABBIE Y. HOLESAPPLE,
410 Valley National Building,
Tucson, Arizona.
Attorneys for Defendants.

[42]

Copy received 3/27/42.

LESLEY B. ALLEN.

[Endorsed]: Filed Mar. 27, 1942. [43]

In the United States District Court
For the District of Arizona

November 1941 Term

At Tucson

Minute Entry of

MONDAY, APRIL 6, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ. 54

[Title of Cause.]

This case comes on regularly for hearing this day for settlement of findings herein. Leslie V. Allen, Esquire, appears as counsel for the Plaintiff. Lawrence V. Robertson, Esquire, appears as counsel for the defendants.

Plaintiff's proposed findings and defendants objections and requested amendments thereto are now duly argued, and

It Is Ordered that plaintiff reengross plaintiff's proposed findings 29 and 30 into the findings of fact, giving a resume of defendants' financial standing; and

It Is Ordered that defendants' proposed amendment No. 1 be and it is disallowed.

It Is Ordered that defendants' proposed amendments Nos. 2 and 9 be allowed and that the remaining proposed amendments be disallowed, and

It Is Further Ordered that the objections of the defendants be overruled and that counsel for the

plaintiff reengross findings of fact and conclusions of law and serve a copy thereof on counsel for the defendants. [44]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Above Entitled Cause having come on regularly for trial before the above entitled court on the 29th day of January, 1942; the said cause having been tried by the court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and upon the 2nd and 3rd days of February, 1942; the said cause having been taken under advisement by the court on the said 3rd day of February, 1942; the court's decision having been rendered on March 23, 1942; a draft of findings having been prepared and filed by counsel for plaintiff, pursuant to rule; objections and proposed amendments having been prepared and filed by counsel for defendants; and the matter of the findings having been duly settled by the said court on the 6th day of April, 1942, Now, Therefore,

The Court Does Find the Facts, specially, as follows:

I.

That the plaintiff, Edward J. Donovan, was a resident of the State of New Jersey at the time he filed his complaint herein.

II.

That the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, were both residents of the State of Arizona at the time of the filing of such complaint.

III.

That the matter in controversy in such action, exclusive of [45] interest and costs, exceeds the sum of Three Thousand Dollars.

IV.

That, for a long time prior to and including the 31st day of March, 1939, said plaintiff had been engaged, at the City and State of New York, in professional practice as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood.

V.

That, on or about the 31st day of March, 1939, Robert Jeffcott, the infant son of said defendants, then being about seven days old, was diagnosed by his attending physicians, at Tucson, Arizona, as suffering from a complete intestinal obstruction.

VI.

That, on or about such 31st day of March, 1939, the said attending physicians of such infant decided that a surgeon having specialized and outstanding training, experience and skill, in performance of the operation for correction of intestinal obstruction in the newborn, should be employed by defendants to operate upon the said Robert Jeffcott.

VII.

That such attending physicians, then and thereupon, suggested to defendants that they employ plaintiff to perform such operation upon such infant son of defendants.

VIII.

That defendants, thereupon and on or about such 31st day of March, 1939, instructed Dr. Hugh C. Thompson, one of such attending physicians of such infant, to act on their behalf in employing plaintiff to perform such operation upon their said son.

IX.

That the said Hugh C. Thompson, then and pursuant to such instructions, arranged that plaintiff would perform such operation upon such infant at Babies Hospital in New York City on the 1st day [46]

of April, 1939, it being contemplated and arranged that such infant, accompanied by necessary medical and nursing attendants, should be flown to New York City by airplane.

X.

That, shortly thereafter and on said 31st day of March, 1939, the said defendants advised the said Hugh C. Thompson that they desired and were instructing him to make further employment arrangements with plaintiff, under which plaintiff should fly forthwith to Tucson, Arizona, in order to perform such operation there, instead of at New York City; and that defendants did then advise the said

Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff.

XI.

That the said Hugh C. Thompson, pursuant to such instructions and on said 31st day of March, 1939, did negotiate with plaintiff the second time, relative to his employment by defendants, did advise him that defendants desired that he fly forthwith to Tucson, Arizona, to perform such operation, and, in connection therewith, did advise plaintiff that defendants had stated that money was no object.

XII.

That plaintiff thereupon accepted such employment by defendants and agreed to proceed to Tucson, Arizona, by airplane, and to operate upon such infant at Desert Sanatorium, Tucson, Arizona, where such infant was then hospitalized.

XIII.

That such defendants desired and negotiated such change in the employment of plaintiff because they felt that plaintiff's coming to Tucson, Arizona, to there perform such operation, would disturb the orderly routine of fewer people.

XIV.

That, pursuant to such employment and on said 31st day of [47] March, 1939, plaintiff departed from State of New Jersey by airplane and arrived at Tucson, Arizona, during the forenoon of Sunday, the 1st day of April, 1939.

XV.

That, after arriving at Tucson, Arizona, and on said 1st day of April, 1939, plaintiff examined such infant and the available X-rays, held consultations with the attending physicians of such infant and performed an abdominal operation upon such infant for the correction of intestinal obstruction.

XVI.

That, in the course of performing such operation, plaintiff did find and diagnose that such infant was suffering from congenital malformation of the intestinal tract and from malrotation of the small intestine, resulting in complete obstruction.

XVII.

That, in the course of performing such operation, plaintiff did correct such condition of malformation, malrotation and obstruction by bringing the cecum of such infant down to its normal position, by cutting away a band on the ileum of such infant, by untwisting the volvulus and turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, by attaching the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen, where it belonged, and by closing the abdomen in layers.

XVIII.

That, upon completion of such operation, plaintiff caused such infant to be immediately transfused and

then to be given a continuing infusion of glucose and saline until infusion was no longer needed.

XIX.

That plaintiff thereafter remained at Tucson, Arizona, in continued attendance upon such infant, for approximately twenty-four hours and until it had become apparent to plaintiff that such [48] infant no longer required his specialized surgical care.

XX.

That plaintiff then returned to New Jersey by airplane and arrived at his New York office during the afternoon of April 3rd, 1939.

XXI.

That plaintiff thereafter communicated with and extended advice to said Hugh C. Thompson, one of the attending physicians of such infant, in the course of post-operative care.

XXII.

That such operation was successful in correcting such obstruction, in that such infant survived such operation with apparent normal functioning of the intestinal tract.

XXIII.

That such operation was successful in correcting such congenital malformation, in that an X-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position.

XXIV.

That the matter of the amount to be charged by plaintiff for his professional services in performing such operation was not discussed by plaintiff and the said Hugh C. Thompson in the course of said negotiations for the employment of plaintiff.

XXV.

That the amount to be charged by plaintiff for such professional services was not discussed by plaintiff and defendants at any time prior to rendition of statement, by plaintiff to defendants, on or about May 1, 1939.

XXVI.

That the condition of such infant, prior to such operation, was very critical, in that is necessitated the performance upon such infant, at a very tender age, of an extremely difficult, delicate and dangerous surgical operation. [49]

XXVII.

That said plaintiff, prior to said 1st day of April, 1939, had had special and extensive training and experience in caring for surgical conditions of infancy and childhood, had had an unusual and outstanding degree of experience in performing the operation, upon newborns and infants, for correction of complete intestinal obstruction, and had attained some national recognition and prominence in such field of pediatric surgery.

XXVIII.

That one or both of the parents of defendant David C. Jeffcott made a gift to such defendant, during 1935, amounting to approximately Seventy-five Thousand Dollars (\$75,000.00);

That defendants used a substantial portion of such gift, during 1936 and 1937, for the purchase of a cattle ranch, located in southern Arizona, paying approximately Fifty Thousand Dollars (\$50,000.00) for such ranch without cattle;

That one or both of the said parents promised to assist the said David C. Jeffcott financially in getting started in the cattle ranching business;

That, making use of such financial assistance and during 1937, defendants began a program of improving, stocking and developing such ranch, including purchases of cattle, made during 1937 and 1938, amounting to about Forty-four Thousand Dollars (\$44,000.00);

That, at the time of the employment of plaintiff and at the time of the performing of the said operation, defendants were the owners of and were operating such cattle ranch;

That such ranch, at or about the time of employment of said plaintiff by said defendants, was worth approximately One Hundred Fifty Thousand Dollars (\$150,000.00), and was subject to an indebtedness of about Seventy Thousand Dollars (\$70,000.00); in favor of one or both of the said parents of David C. Jeffcott;

That a mortgage, to secure payment of such in-

debtedness, was [50] given by defendants to David C. Jeffcott's mother during August, 1939;

That the operation of such ranch did not produce net income for the years 1937 to 1941, both included; but

That during such years the defendants expended approximately Forty-four Thousand Dollars (\$44,000.00) for the purchase of cattle, expended approximately Eighty-three Thousand Dollars (\$83,000.00) for ranch expense, off-set to a substantial degree by sales of cattle and increases in cattle inventories, and expended in excess of Forty Thousand Dollars (\$40,000.00), designated by them as personal expenditures, off-set by dividend income of approximately Six Hundred Fifty Dollars (\$650.00); and

That, on or about the 2nd day of February, 1942, the said ranch of defendants was worth approximately One Hundred Ninety-nine Thousand Nine Hundred Dollars (\$199,900.00), and the mortgage indebtedness, in favor of said David C. Jeffcott's mother, had increased to the sum of approximately One Hundred Twenty-eight Thousand Dollars (\$128,000.00), such mortgage securing payment of the advances made to the said David C. Jeffcott by his said parents during such period of time and the accumulated interest thereon; and

That such defendants anticipated, on or about February 2nd, 1942, that the operation of such ranch, beginning with the year 1942, would produce a net income of between Five Thousand Dollars (\$5,000.00) and Eight Thousand Dollars (\$8,000.00).

XXIX.

That the plaintiff's gross earnings during 1939 amounted to Forty Thousand Eight Hundred Eighty-seven and 05/100 Dollars (\$40,887.05), which said earnings including the sum of Two Thousand Five Hundred Dollars (\$2,500.00) paid by the defendants herein. [51]

XXX.

That the plaintiff had performed eighteen operations of the nature of that performed upon the Jeffcott baby and for which he had received the following compensation: fourteen no charge; one Two Hundred Fifty Dollars (\$250.00); one Three Hundred Fifty Dollars (\$350.00); one One Thousand Dollars (\$1,000.00); one Two Thousand Five Hundred Dollars (\$2,500.00).

XXXI.

That the reasonable value of the said professional services of plaintiff, in performing such operation upon the infant son of such defendants under such circumstances, amounts to the sum of Seven Thousand Five Hundred Dollars (\$7,500.00).

XXXII.

That defendants have paid to plaintiff, on account of such professional services, the sum of Two Thousand Five Hundred Dollars (\$2,500.00).

Wherefore, the court does state separately its conclusions of law thereon, as follows:

1.

That the said court had and has proper and lawful jurisdiction of such cause.

2.

That the said Hugh C. Thompson was acting as the lawful agent for and on behalf of said defendants, and within the scope of his agency, in negotiating for and arranging the employment of plaintiff to operate upon the infant son of defendants at Tucson, Arizona, for the correction of intestinal obstruction.

3.

That the amount to be charged by plaintiff, for his professional services in performing such operation, was not determined by any contract between plaintiff and defendants. [52]

4.

That defendants, by virtue of such employment of plaintiff and by virtue of plaintiff performing such operation upon the infant son of defendants, became jointly and severally indebted to plaintiff in the amount of the reasonable value of the professional services of plaintiff, in accepting such employment and performing such operation, such reasonable value being in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and that defendants have paid to plaintiff the sum of Two Thousand Five Hundred Dollars (\$2,500.00) on account of such indebtedness.

Wherefore the court hereby directs that formal judgment be made and entered in such cause, in favor of plaintiff and against the said defendants and each thereof, for the sum of Five Thousand

Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from entry of judgment until paid, and for plaintiff's costs herein expended, with like interest.

Made And Entered Herein this 10th day of April, 1942.

ALBERT M. SAMES,

Judge of the District Court of
the United States, for the
District of Arizona.

LESLEY B. ALLEN,

37 N. Church St.,
Tucson, Arizona

Attorney for plaintiff

Copy received April 7, 1942.

LAWRENCE V. ROBERTSON

of counsel for defendants. [53]

[Endorsed]: Filed Apr. 10, 1942. [54]

[Title of District Court and Cause.]

OBJECTIONS TO FINAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Come now the above named defendants and object to the proposed final findings of fact, conclusions of law and order for judgment submitted and filed by the above named plaintiff on the 7th day of April, 1942, as follows, to-wit:

I.

Said defendants hereby renew all objections here-

tofore filed to the original proposed findings of fact, conclusions of law and form of judgment which were denied or overruled in part by the above court.

II.

That said defendants specifically object to the finding of fact number XXVIII upon the ground and for the reason that the facts therein stated are contrary to the evidence in the case, that the form of such statement of fact is misleading, erroneously and improperly summarizes the true facts as testified to by the defendants, and indirectly infers an agreement on the part of the parents of the defendant, David C. Jeffcott, and tends to indicate a legally enforceable agreement on the part of such parents to advance money on behalf of the defendants herein.

III.

Said defendants further expressly renew and object to finding of fact number XXXI upon the ground and for the reason that such is not a fact but

[55]

a conclusion and that such conclusion is not a fair and reasonable one based upon a consideration of the services rendered, the time devoted by the plaintiff, a comparison with his annual income, and charges for similar services by the plaintiff, and the financial ability of the defendants to pay.

IV.

Said defendants further expressly object to the conclusion of law number 4 for the reasons and

upon the grounds stated in objections number III above set forth.

V.

Said defendants further object to the order that formal judgment be made and entered in the sum of Five Thousand Dollars (\$5,000.00) for the reasons voiced in objections III and IV above set forth.

Wherefore, said defendants pray that the foregoing objections be sustained, and that the court find that said plaintiff has been paid the reasonable value of the services rendered by him to the defendants, and for such other order in the premises as the court may deem just and proper.

DARNELL, PATTEE &
ROBERTSON
By LAWRENCE V. ROBERTSON
ABBIE Y. HOLESAPPLE,
410 Valley National Building,
Tucson, Arizona.
Attorneys for Defendants.

Copy received this 10th day of April, 1942.

LESLEY B. ALLEN,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 10, 1942. [56]

In the United States District Court
For the District of Arizona
November 1941 Term At Tucson

Minute Entry of
FRIDAY, APRIL 10, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ. 54

[Title of Cause.]

The reengrossed form of findings of fact and conclusions of law having been submitted to the Court pursuant to the order therefor heretofore entered,

It Is Ordered that the same be approved and filed herein as the findings of fact and conclusions of law.

[57]

In the United States District Court for the
District of Arizona
November 1941 Term At Tucson

Minute Entry of
MONDAY, APRIL 13, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

Form of judgment having been submitted to the Court by the counsel for the palintiff, endorsed "ap-

proved as to form subject to all objections made to findings of fact and conclusions of law'' by counsel for the defendants,

It Is Ordered that said form of judgment be approved and entered as the judgment herein as follows: [58]

In the United States District Court, for the
District of Arizona

Civil Action, File No. 54-Tucson

EDWARD J. DONOVAN,

Plaintiff,

vs.

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Defendants.

JUDGMENT

The Above Entitled Cause having come on regularly for trial before the above entitled court on the 29th day of January, 1942, on the Amended Complaint of plaintiff and the Answer of defendants, Mr. Lesley B. Allen having appeared for plaintiff and Messrs. Darnell, Pattee and Robertson and Mr. Abbie Y. Holesapple having appeared for defendants; and the said cause having been tried before such court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and on the 2nd and 3rd days of February, 1942, the said parties appearing in person and by counsel aforesaid; and

evidence, both oral and documentary having been offered and received on behalf of the said parties; and both sides having rested; and

The Said Court having taken such cause under advisement on said 3rd day of February, 1942, with reserved ruling as to the admission of certain evidence; having subsequently ruled and admitted all of such evidence; having found the facts, specially, as appears from Findings of Facts now on file in such cause; having stated separately its conclusions of law, based upon such facts, as appears from Conclusions of Law, now on file in such cause; and having directed the entry of judgment in such cause, in favor of plaintiff and against the defendants and each thereof, as more particularly appears from the file of such cause, [59]

Now, Therefore, the court being advised in the premises and as to the law, and the court having found the facts specially and having stated its conclusions of law thereon, separately,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That the said palintiff, Edward J. Donovan, do have and recover of and from the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and from each of such defendants, the sum of five thousand dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the date of entry of this judgment until fully paid and satisfied; and

II.

That the said plaintiff do have and recover of and from the said defendants and each thereof plaintiff's costs of suit herein expended, in the sum of Two hundred and twenty eight Dollars (\$228.00), together with interest thereon at the rate of six per cent (6%) per annum from dates of entry of this judgment until fully paid and satisfied.

Made and Entered Herein this 13th day of April, 1942.

ALBERT M. SAMES

Judge of United States District Court for District of Arizona.

Copy received March 25, 1942.

DARNELL, PATTEE &

ROBERTSON,

of counsel for defendants oj

Approved as to form subject to all objections made to findings of fact and conclusions of law.

LAWRENCE V. ROBERTSON

of counsel for defendants [60]

[Endorsed]: Judgment entered and filed Apr. 13, 1942. [61]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the above named defendants, pursuant to Rule 59-a of Rules and Civil Procedure, and move as follows, to-wit:

(a) That a new trial be granted in the above entitled action to said defendants.

(b) That the court set aside the judgment heretofore entered on the 13th day of April, 1942, and enter judgment herein for the defendants.

(c) That the court set aside the findings of fact and conclusions of law heretofore entered and make amended findings of fact pursuant to the motion and offered amendments thereto which were submitted by said defendants prior to the entry of judgment, and that all objections that were made by said defendants to the findings of fact and conclusions of law as entered by the court be sustained.

(d) That the court modify its judgment which was entered herein by materially reducing the amount of such judgment.

The foregoing motions are predicated upon the following grounds:

1. The judgment is not justified by the evidence, is contrary to such evidence and to the law as grossly excessive.

2. That the court erred in rejecting evidence offered by the defendants.

3. That the court erred in admitting evidence offered [62] by the plaintiff and objected to by the defendants.

Wherefore, said defendants pray that the motions above made in the alternative be granted, and for such other relief in the premises as the court may deem just and proper.

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

ABBIE Y. HOLESAPPLE

410 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants.

Copy received this 20th day of April, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff B

[Endorsed]: Filed Apr. 20, 1942. [63]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

Rule 59 of the Rules of Civil Procedure provides for the granting of a new trial, opening of the judgment, amendment of findings of fact and conclusions of law, and for the making of new findings and conclusions, and permits the entry of a new judgment.

The defendants' principal ground for the motion made in the alternative is that the court's award to the plaintiff is grossly excessive and unreasonable in view of the evidence offered in the case. The award is entirely out of proportion to the evidence of the plaintiff's annual earnings and his charges

for similar operations. The award is most unreasonable in view of the limited financial ability of the defendants. The court well knows that an equity of Seventy-five Thousand Dollars (\$75,000.00) in a cattle ranch does not constitute substantial worth, and to require the payment of Seventy-five Hundred Dollars (\$7500.00) for an operation and services performed over a sixty-hour period is a most unreasonable assessment to be made against such parties.

The defendants strenuously objected to the admission of any evidence of the financial condition and circumstances of the parents of Mr. Jeffcott. There is no evidence in the case of any legally enforceable agreement on the part of these parents wherein they agreed to pay for the services of Dr. Donovan. In the [64] absence of any such agreement, evidence of their worth is entirely immaterial and unquestionably influenced the court in reaching his decision. The court's own findings show that he considered the fact that the defendants could borrow money from Mr. Jeffcott's parents to be "a source of income". Under no possible theory is this legally tenable. The defendants objected to all of this line of testimony and its admission was prejudicial error.

The defendants also attempted to introduce into evidence on cross-examination of Dr. Donovan, the financial ability of the other persons legally responsible for the payment of the charges made by Dr. Donovan for operations of a similar nature on other

occasions. The court sustained the objection of plaintiff's counsel and would not permit cross-examination on this subject. We feel the court's ruling was extremely prejudicial.

The court admitted the testimony of Drs. Burdick, Downs and Beekman and permitted them to express an opinion as to the value of the services of Dr. Donovan where the hypothetical questions propounded to them contained no facts showing, nor tending to show the financial ability of the defendants to pay, notwithstanding the admission of each of these parties that the financial ability of the patient to pay was one of the most important considerations in fixing a fee. Their conclusions, given in response to a hypothetical question which omitted an admitted essential fact could be of no such assistance to the court and was prejudicial to the defendants.

The court erred in adopting Findings of Facts No. XXVIII as the findings therein contained are contrary to the evidence, misleading, erroneously and improperly summarizes facts, and contains evidence and inferences relating to the financial assistance offered by Mr. Jeffcott's parents. This whole finding shows an attitude on the part of the court reflecting a [65] consideration of the financial ability of the parents in determining a reasonable charge to be made. Whether these parents were as rich as Croesus or were on W.P.A. relief, was of no consequence in establishing a reasonable charge for services rendered at the instance and request

of the defendants. The fact that Mr. Jeffcott borrowed money from them should be given no more consideration or import than had he borrowed the money from a banking institution. All moneys borrowed were evidenced by notes and secured by a mortgage in a bona fide businesslike manner.

The court's award is entirely unreasonable inasmuch as it constitutes approximately one-third of the plaintiff's annual income, and the evidence shows that he devoted only sixty hours out of that year, plus a few telephone calls, to the case. The award also represents one-tenth of the defendants' net worth and over one years net annual income. It is hard to say in what way the defendants' financial condition was considered by the court.

For the foregoing reasons, we submit that the court should either grant a new trial, enter judgment for the defendants, or at least substantially modify the amount of the award.

Respectfully submitted,

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

ABBIE Y. HOLESAPPLE

410 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants [66]

Copy received this 20th day of April, 1942.

LESLEY B. ALLEN B

Attorney for Plaintiff.

[Endorsed]: Filed Apr. 20, 1942. [67]

In the United States District Court for the
District of Arizona

May 1942 Term

At Tucson

Minute Entry of
MONDAY, MAY 4, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

It Is Ordered that the defendants' motion for a new trial, heretofore submitted, be denied. [68]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the undersigned, attorneys for the respective parties herein, that the amended complaint which was filed in this cause on the 28th day of January, 1942, was duly and regularly filed, and that an order may be entered by this court permitting the filing of said complaint and permitting the answer of the defendants herein to the original complaint to stand as against said amended complaint; and

It Is Further Stipulated that the trial of said cause was upon the issues as framed by said amended complaint and the defendants' answer to the original complaint; and

It Is Further Stipulated that upon the giving of a notice of appeal herein that said defendants may file a cash bond with the clerk of this court in the sum of Five Thousand Two Hundred Fifty Dollars (\$5,2500.00), which shall be as a supersedeas and cost bond and secure the payment of the principal amount of the judgment, interest thereon and costs if the appeal is dismissed or the judgment affirmed or of such judgment principal and costs as the appellate court may award if the judgment is modified.

Dated this 29th day of June, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

Attorneys for Defendants [69]

Copy received this 29th day of June, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff.

[Endorsed]: Filed Jul. 8, 1942. [70]

In the United States District Court for the
District of Arizona

May 1942 Term

At Tucson

Minute Entry of
WEDNESDAY, JULY 8, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

Lawrence V. Robertson, Esquire, is present on behalf of the defendants. No appearance is made by or on behalf of the palintiff. Whereupon,

It Is Ordered that the stipulation today filed in these proceedings and now presented by said counsel for the defendants be and it is approved.

It Is Further Ordered that the amended complaint herein filed on the 28th day of January, 1942 be and it is filed, and that the answer of the defendants to the original complaint stand as against said amended complaint. [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Edward J. Donovan, Plaintiff, and Leslie B. Allen, Attorney for Plaintiff.

Notice Is Hereby Given that David C. Jeffcott and Elsie Jeffcott, his wife, defendants above named, hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from the findings of fact, conclusions of law, and the judgment entered thereon entered in this action on the 13th day of April, 1942.

Dated this 8th day of July, 1942.

DARNELL, PATTEE &
ROBERTSON

By LAWRENCE V. ROBERTSON

A Member of the Firm
410 Valley National Building,
Tucson, Arizona
Attorneys for David C. Jeffcott and Elsie Jeffcott, his wife, Defendants.

[Endorsed]: Filed Jul. 8, 1942. [72]

[Title of District Court and Cause.]

STIPULATION

Whereas, during the trial of the above cause, upon suggestion of the court and agreement of counsel, the reading of the depositions of Doctors William A. Downes and Carl G. Burdick and Fenwick Beekman was suspended after question No. 76 of the deposition of Doctor Downes had been asked and answered, it being agreed that the court would read the remainder of the depositions of said witnesses considering objections that had been interposed at the time of the taking of said depositions and would consider all objections that had been interposed during the reading of the portion of the deposition

of Doctor Downes as being applicable to similar questions and subject matters contained in the subsequent portion of said depositions and would permit counsel to submit additional objections to the admissibility, relevancy or materiality of the subject matter of said depositions; and

Whereas, it is necessary for the portion of said depositions which was not read during the trial to be incorporated in the reporter's transcript of testimony;

Now, Therefore,

It Is Agreed that the court reporter shall insert the balance of the testimony and objections contained in the three depositions above mentioned into the transcript of testimony [73] commencing on page 265 of said transcript and continuing thereafter throughout said depositions. The court reporter shall then continue with the transcript of testimony in its regular order.

It Is Hereby Stipulated and Agreed that said testimony shall be considered as though the same had been read during the trial of said action and that all objections made by the attorney for the defendants to the portion of the depositions which was read shall be considered as having been made as to the remaining portions of said depositions in so far as said portions may be applicable and that the trial court's ruling thereon would have been the same. Said testimony shall also be subject to all objections actually made during the taking of said depositions.

It Is Further Stipulated that this stipulation shall

be incorporated in the abstract of record on appeal in this cause.

Dated this 9th day of July, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

410 Valley National Building,

Tucson, Arizona

Attorneys for David C. Jeffcott and Elsie Jeffcott, his wife, Defendants.

Copy received this 9th day of July, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

[Endorsed]: Filed Jul. 21, 1942. [74]

In the United States District Court for the
District of Arizona

May 1942 Term

At Tucson

Minute Entry of
SATURDAY, JULY 25, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

It Is Ordered that the stipulation, filed herein July 21, 1942, to incorporate depositions into the reporter's transcript be and it is approved. [75]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
ABSTRACT OF RECORD

Upon motion being made by the attorneys for the above named defendants, and just cause being shown,

It Is Hereby Ordered, Adjudged and Decreed that the time within which the clerk of this court is to file the abstract of record in this matter with the clerk of the Circuit Court of Appeals of the Ninth Circuit shall be, and is hereby, extended for a period of thirty (30) days from and after the 17th day of August, 1942.

Done in Open Court this 3rd day of August, 1942.

ALBERT M. SAMES

Judge

Copy rec'd Aug. 3, 1942.

LESLEY B. ALLEN

Atty for Pltf B.

[Endorsed]: Filed Aug. 3, 1942. [76]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON
APPEAL

To the Clerk of the United States District Court,
for the District of Arizona:

We hereby respectfully request that the following be incorporated as the record on appeal in the above action and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

1. Plaintiff's amended complaint.
2. Defendants' answer.
3. Notice of Clerk of United States District Court, dated March 23rd, 1942.
4. Findings of fact and conclusions of law.
5. Defendants' request for filing of objections and amendments to findings of fact and for oral argument, dated March 30th, 1942.
6. Defendants' objections to findings of fact and conclusions of law and offered amended additional findings of fact.
7. Final findings of fact, conclusions of law and order directing judgment.
8. Defendants' objections to final findings of fact and conclusions of law.
9. Judgment.
10. Motion for new trial.
11. Memorandum of points and authorities in support of [77] motion for new trial.
12. Notice of appeal.
13. Stipulation for order permitting filing of

amended complaint and permitting defendants' answer to original complaint to stand as to amended complaint, and for order approving cash bond in the sum of \$5,250.00.

14. Stipulation as to depositions of Drs. William A. Downs, Carl B. Burdick and Penwick Beekman filed July 21st, 1942.

15. The following minute orders of the court:

(a) Order entered March 23rd, 1942, overruling all objections to expert testimony.

(b) Order entered April 6th, 1942, sustaining objections to findings of fact and conclusions of law and ordering revision and additional findings of fact.

(c) Order entered April 10th, 1942, approving reingrossed findings of fact.

(d) Order entered April 13th, 1942, approving judgment.

(e) Order entered May 4th, 1942, denying defendants' motion for new trial.

(f) Order entered July 8th, 1942, approving stipulation as to filing amended complaint and approving cash bond.

(g) Order entered July 23rd, 1942, approving stipulation as to depositions of Drs. Downs, Burdick and Beekman.

(h) Order entered August 3rd, 1942, extending time for filing abstract of record on appeal.

16. Reporter's transcript of testimony.

17. All exhibits, except plaintiff's Exhibit No. 6.

18. Stipulation re plaintiff's Exhibit No. 6.

19. Designation of portions of record. [78]
20. Statement of points relied upon on appeal.

DARNELL & ROBERTSON

By LAWRENCE V. ROBERTSON

A Member of the Firm

410 Valley National Building,

Tucson, Arizona

Attorneys for Defendants.

Copy recieved this 19th day of August, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

[Endorsed]: Filed Aug. 19, 1942. [79]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The defendants rely upon the following points as the basis of their appeal to the Circuit Court of Appeals of the Ninth Circuit.

I.

The court erred in its finding of fact No. XXVIII in that it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff, which finding is not supported by the evidence and is in conflict therewith. That said finding is also erroneous and misleading in that it sets out in a lump sum the receipts and disbursements over a period of approximately five years which does not show the true financial condition of the parties on the date when the services were

rendered by the plaintiff. Said finding is also erroneous and misleading in that it sets forth a lump sum of personal expenditures without indicating that a portion of said expenditures was for initial ranch expense and also over Six Thousand Dollars (\$6,000.00) for expenses incurred in connection with the illness of the minor son who was operated on by the plaintiff, and said sum also includes Two Thousand Five Hundred Dollars (\$2,500.00) which was paid to the plaintiff. [80]

II.

The court erred in its finding of fact No. XXXI in that the determination of a reasonable fee in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) was contrary to law and the evidence adduced at the trial, was excessive and unreasonable for the following reasons:

(a) That the fee was disproportionate to other fees charged and collected for similar services performed by the plaintiff.

(b) That the fee was disproportionate to the annual income of the plaintiff and represents an excessive charge for the services rendered.

(c) That the fee is excessive and unreasonable in view of the financial ability of the defendants to pay.

(d) That the fee was determined upon an assumption by the court that the defendants' parents were financially obligated to pay said fee.

III.

The court erred in its conclusion of law No.

4 in that the court's conclusion that the sum of Seventy-five Hundred Dollars (\$7,500.00) was a reasonable fee for plaintiff's services, was erroneous in that such conclusion was contrary to the law and the evidence adduced at the trial of said cause, was excessive and unreasonable for the reasons stated above in support of point No. II.

IV.

That the judgment of the court made and entered on the 11th day of April, 1942, was not sustained by the law or the evidence adduced at the trial of said cause, was unreasonable and excessive for the reasons stated in support of points No. II and III herein.

V.

That the court erred in permitting Drs. William A. Downs, Carl G. Burdick and Fenwick Beekman to testify, through deposition, [81] as witnesses on behalf of the plaintiff and to express an opinion as to the reasonable value of the services performed by said plaintiff in that the hypothetical questions which were propounded to each of said experts did not assume or contain any facts of or reference to the financial condition of the defendants or their ability to pay for professional services.

VI.

The court erred in admitting evidence of the financial ability of the parents of the defendant, David C. Jeffcott, who were in no way obligated to pay for the professional services rendered to

the defendants, which said evidence was highly prejudicial to the defendants.

VII.

The court erred in denying the defendants' motion for new trial, and in refusing to modify or mitigate the award made the plaintiff herein for the reasons stated in support of points Nos. II, III and IV herein.

Respectfully submitted,

DARNELL & ROBERTSON,

By LAWRENCE V. ROBERTSON,

A Member of the Firm,

410 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants.

Copy received this 19th day of Aug., 1942.

LESLEY B. ALLEN,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 19, 1942. [82]

In the United States District Court
for the District of Arizona

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the

records, papers and files in the case of Edward J. Donovan, Plaintiff, versus, David C. Jeffcott and Elsie Jeffcott, his wife, Defendants, numbered Civil 54-Tucson, on the docket of said Court.

I further certify that the attached pages numbered 1 to 82, inclusive, together with the duplicate original of the reporter's transcript duly certified by said reporter transmitted herewith, contain a full, true and correct transcript of the proceedings of said cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record on appeal from the judgment entered April 13, 1942 in the above-entitled cause as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$17.35 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 8th day of September, 1942.

[Seal]

EDWARD W. SCRUGGS,
Clerk. [83]

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the plaintiff,

Lesley B. Allen, Esquire,
37 North Church Street,
Tucson, Arizona.

For the defendants,

Messrs. Darnell & Robertson,
Valley National Building,
Tucson, Arizona.

The United States District Court, for the District of Arizona, convened at ten o'clock in the forenoon, January 29, 1942, with the Honorable Albert M. Sames, judge of said court, presiding, and the other regular officers of the court present.

The plaintiff appeared in person and by his attorney, Lesley B. Allen, Esquire; and the defendants were present in person and were represented by counsel, Messrs. Darnell and Robertson.

Lenna H. Burges was sworn to report the trial in shorthand and transcribe her shorthand notes, if requested to do so, to the best of her skill and ability.

Thereupon, and all parties announcing themselves ready, the trial proceeded as follows:

Mr. Allen: Does the court require the reading of the complaint?

The Court: I think not. Was there an amended complaint?

Mr. Allen: An amended complaint was filed with consent of counsel yesterday, but the only amendment was changing and correcting a typographical error as to the plaintiff. I call Mr. Jeffcott for cross-examination under the rule.

DAVID C. JEFFCOTT,

one of the defendants herein, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was cross-examined under the rule and testified as follows:

Cross Examination

By Mr. Allen:

Q. Your name is David C. Jeffcott?

A. Yes, sir.

Q. And you, with your wife, Elsie Jeffcott, are defendants in this action brought by Dr. Edward J. Donovan. Is that correct? A. Yes, sir.

Q. And what is the full name of your son who was operated [2*] on by Dr. Donovan?

A. Robert Crawford Jeffcott, II.

Q. Robert Crawford Jeffcott. When was your son, Robert Crawford Jeffcott, born?

A. I believe it was eight days before Dr. Donovan operated on the child.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of David C. Jeffcott.)

Q. He operated on the child on or about the second day of April, 1939, did he not?

A. Yes, sir, it was on a Sunday morning.

Q. Now who, or what physicians did you have in attendance on your wife or upon your son, Robert, prior to the time that you brought Dr. Donovan on the case?

A. Dr. Carrell delivered my baby, our baby, and Dr. Hugh Thompson, of course, is a member of the Desert Sanatorium staff, and was also in attendance, anyhow from the time it was first seen that the baby was not well. I believe Dr. Thompson and Dr. Carrell then called Dr. Vivian Tappan as consultant.

Q. Now, when did you decide to employ Dr. Donovan with reference to the birth of the child?

A. When it was known that the baby was going to need an operation.

Q. Would that have been on or about somewhere from the fifth to the seventh day of its life?

A. I think that it was either the preceding Thursday or Friday. I think it was Friday.

Q. That it was decided that an operation would be necessary? [3]

A. Yes, sir.

Q. Who advised you that an operation would be necessary?

A. I don't remember who the person was that told us, of the three doctors that were in attendance.

(Testimony of David C. Jeffcott.)

Q. At least one or more of the physicians who were in attendance upon the child at that time told you? A. Yes, sir.

Q. And that may have been Dr. Tappan, as far as you recall at this time?

A. I could not say which doctor it was.

Q. Now, where was the conversation had with reference to the need for an operation?

A. I believe it was at the Desert Sanatorium, sir.

Q. In your wife's room at the Desert Sanatorium, was it?

A. I am not sure that the first I heard of that was in her room.

Q. But it was discussed in the presence of both of you before any decision was reached?

A. That is correct, sir.

Q. Do you remember who suggested the employment of Dr. Donovan?

A. To the best of my knowledge, when it was known that an operation was necessary on the baby, there was some question as to where a doctor could be found who was able to perform that operation. I think it was suggested that possibly we might locate one on the Coast. Dr. Tappan and Dr. Thompson both were acquainted with [4] Dr. Donovan, and I think it was natural that their choice would be Dr. Donovan. Now, whether it was Dr. Tappan

(Testimony of David C. Jeffcott.)

or Dr. Thompson who first suggested Dr. Donovan, I don't just remember.

Q. You don't just remember?

A. Whether it was Dr. Tappan or Dr. Thompson who first suggested Dr. Donovan I do not now remember, though Dr. Thompson was the person who then spent most of the time with us and made the final arrangements.

Q. And he made those arrangements at your suggestion and at your request, did he not?

A. I don't know exactly that you could put it that way, sir. However, it was decided that we had to employ a doctor and inasmuch as Dr. Donovan was the man that Dr. Tappan and Dr. Thompson thought was the best man, we had no choice except to follow their suggestion.

Q. And you authorized and directed one or both of them to make the necessary arrangements, did you not?

A. Yes, sir. We were not acquainted with Dr. Donovan.

Q. You did not call Dr. Donovan yourself?

A. No, sir, I did not.

Q. You had one of those doctors do it?

A. One of the doctors offered to do it.

Q. And you accepted that offer?

A. Yes, sir.

Q. That doctor was Dr. Hugh Thompson, was it not, that [5] finally called Dr. Donovan?

A. Yes, sir.

(Testimony of David C. Jeffcott.)

Q. He first called Dr. Donovan by long distance and made arrangements that the baby, attended by a physician and the necessary nursing staff, be taken to New York by plane to receive attention from Dr. Donovan at New York, did he not?

A. Yes, sir, I think that is correct.

Q. Then shortly thereafter, during that same day, and having discussed the matter with your wife and with others, you proposed to him, did you not, that he again get in touch with Dr. Donovan concerning the matter?

Mr. Robertson: If the court please, I object to that question, because it encompasses too many facts. Mr. Allen starts out and gives a long narrative of various things that happened without giving the witness an opportunity to answer to each one.

The Court: You make an objection the compound question?

Mr. Robertson: Yes, a compound question, to which it would be impossible to give a simple, intelligent answer.

Mr. Allen: I believe it is subject to an answer. I believe the [6] witness understands the question readily.

The Court: Mrs. Reporter, read the question.

The Reporter: (Reading)

Q. Then shortly thereafter, during that same day, and having discussed the matter with your wife and with others, you proposed to him, did you not, that he again get in touch with Dr. Donovan concerning the matter?

(Testimony of David C. Jeffcott.)

The Court: Answer the question.

A. May I elaborate on that question, or must I answer it "yes" or "no"?

Mr. Allen: I would like the "yes" or "no" answer. A. The answer is yes.

Q. What is your answer?

A. Yes. The answer is yes, sir.

Q. I think your counsel will give you full opportunity to elaborate on it. I will proceed, if I may. The reason that that decision was—I will withdraw that. When you had such second conversation with Dr. Thompson, you requested him then, did you not, to arrange if possible to have Dr. Donovan come here and perform the needed operation at the Desert Sanatorium? [7] A. Yes, sir.

Q. And your reason for that was that you understood and believed that it would be easier and better for the baby if that were done?

A. Yes, sir, that was part of the reason, sir.

Q. What were your other reasons?

A. That it did not seem to us that it would be any more expensive to have the doctor come here than it would be to take the doctor there—excuse me—to take the baby, the doctor and attendants, nurse and necessary paraphernalia to the doctor.

Q. Now, in the course of that conversation with Dr. Thompson, preparatory to his second negotiation with Dr. Donovan, Dr. Thompson asked you if money or expense was any object, did he not?

A. Yes, sir, he did.

(Testimony of David C. Jeffcott.)

Q. And you told him that it was not?

A. I don't think I ever said that. I think what I said in answer to his question was that it would not cost much more to have the doctor come here than to take the doctor and baby and nurse and paraphernalia to New York to Dr. Donovan.

Q. You think that is what you told him?

A. Yes, sir.

Q. You could be mistaken in that respect, I presume?

A. I think I am testifying from the best of my knowledge. The time is several years since then.

[8]

Q. It is quite a while back and you could be mistaken about what you said? A. Yes, sir.

Q. You also told Dr. Thompson, as a part of that conversation relative to your instructions to him concerning the second negotiations with Dr. Donovan, did you not, that if he objected to coming here to perform the operation, that you could put pressure on him through Dr. Palmer, in New York?

A. I never remember making such a statement.

Q. You merely say you do not remember such a statement?

A. I might add that I do not think I am in the habit of doing that sort of thing.

Q. And still your answer is you do not remember making such a statement?

A. Yes, sir, one either remembers or one does not remember.

(Testimony of David C. Jeffcott.)

Q. And you do not remember such a statement?

A. I do not remember such a statement.

Q. Now, you know it to be a fact, do you not, Mr. Jeffcott, that Dr. Thompson, following your request and your instructions as to that second conversation, did have such a conversation with Dr. Donovan, and did make arrangements on your behalf for him to come here and operate at the Desert Sanatorium?

A. Following Dr. Thompson's conversation with Dr. Donovan, he called me back at the point where I was and told me that Dr. Donovan would come and would arrive in Tucson [9] at such and such a time.

Q. And that time was early the next forenoon?

A. Yes, sir.

Q. And Dr. Donovan did arrive early the next forenoon?

A. That was Sunday morning, yes, sir.

Q. And these negotiations were had with him beginning about noon of the preceding day, Saturday?

A. Yes, sir, I think shortly before noon.

Q. And the last conversation or negotiation was slightly after noon?

A. Yes, sir, I believe there may have been an hour's time between the first and second conversations.

Q. And following Dr. Donovan's arrival in Tucson and shortly thereafter, he went into consultation with the local physicians who were attending your son, did he not?

(Testimony of David C. Jeffcott.)

A. I am not too well acquainted with Dr. Donovan's methods after he arrived in Tucson, sir. I asked Dr. Thompson if it would be all right for me to go and meet Dr. Donovan, and he said no, it would be much better that I did not.

Q. You did not meet him and do not know what he did? A. No.

Q. You do know, however, that relatively soon after his arrival, he performed an operation on your son, Robert?

A. Yes, sir, I think between ten and eleven o'clock.

Q. And that operation was for the correction of a complete obstruction of the intestine, was it not?

[10]

Mr. Robertson: I suggest the witness be informed that unless he knows these facts he not answer.

Mr. Allen: I think he is doing very well.

Mr. Robertson: I think he is doing very well, but I think he should be informed that unless he knows, he should not attempt to answer.

Mr. Allen: I believe the counsel should have explained those things to Mr. Jeffcott, and I don't think any remonstrance is due from the counsel or the bench. I object to the counsel attempting to remonstrate.

Mr. Robertson: I object to these continued insinuations by Mr. Allen. I ask Your Honor to instruct the witness that unless he knows——

The Court: Well, answer the question so far as the answer is possible within your knowledge.

(Testimony of David C. Jeffcott.)

The Witness: May I ask for a reading of the question? [11]

The Reporter: (Reading)

Q. And that operation was for the correction of a complete obstruction of the intestine, was it not?

A. I cannot answer that question completely because from the time I knew or heard there was something the matter with the child, so many doctors have called it by so many different terms, that I am not really clear in my mind today of what it involves. As I understood the operation, as told to me in layman's language by a doctor, consisted in going in and removing all of the intestines, laying them on the chest of the child, unwinding them and putting them back in the child in proper position. If that involves, because of the shape the intestines were in, a knot, so to speak, I can understand it. An obstruction to me means a clot of dirt or something in a pipe which would not permit any material to pass through.

Q. You understood no fetid material passed through the intestines of your son prior to that operation?

A. Yes, sir, I think that is correct.

Q. You also understood and regarded the condition of your infant son on Saturday and Sunday, the day that operation was ultimately performed, was very grave indeed, did you not?

A. The three doctors differed in their manner of telling us how grave the situation was.

(Testimony of David C. Jeffcott.)

Q. How did you view the situation, is what I am asking you, Mr. Jeffcott? [12]

A. I should have said that I think three days before the baby looked far worse to me than the day he was operated.

Q. But you still thought his condition was very serious? A. I understood it was serious.

Q. And that is the reason you did not want any local surgeon to attempt the performance of the operation?

A. That is not correct, sir. When you are in a sanatorium or in a hospital or any place like that, and you are not very well acquainted with medicine, you must rely on the doctor's advice, and the several doctor's advice was we should get somebody who specialized in that work.

Q. That is the point exactly. You felt on their advice there was no surgeon available in this locality who had specialized and had particular training in that particular line of surgery?

A. Yes, sir.

Q. And for that reason, because you believed a specialist was necessary, you ultimately employed Dr. Donovan to perform the operation?

A. I was forced to believe it.

Q. You did believe it, did you not?

A. At that time I did.

Q. You did employ Dr. Donovan to perform the operation?

A. At the suggestion of my doctors, yes.

(Testimony of David C. Jeffcott.)

Q. And because you did believe a specialist was essential. That is right, isn't it?

A. As the doctors informed me, yes, sir. [13]

Q. Your son survived this operation, did he not?

A. Yes, sir.

Q. Now, Mr. Jeffcott, did you have any conversation whatever with Dr. Donovan while he was here, with reference to the matter of a fee?

A. No, sir.

Q. You never made any move whatever at any time prior to this operation to bring about an opportunity to discuss a fee with him, did you?

A. I believe that, as you mentioned, sir, the time between Dr. Donovan's arrival and the operation was very short, and naturally I would not have that opportunity.

Q. I understand that, but I still ask you, did you at any time, either before Dr. Donovan performed the operation or during his stay at Tucson, make any effort toward negotiating with him relative to the amount of a fee?

A. I can answer that question, yes, sir.

Q. What is your answer?

A. After the operation, I stayed outside the operating room between thirty and forty-five minutes, while Dr. Donovan sat in a room adjoining the operating room talking to the doctors, I assume about what he had done.

Q. Did you indicate to Dr. Donovan a desire to talk to him?

(Testimony of David C. Jeffcott.)

A. Sir, in my position—Let me change that. I was brought up that my superior was to speak to me first.

Q. You regarded you were inferior to Dr. Donovan?

A. I think in a case like that, yes, sir. [14]

Q. Did you ask Dr. Thompson, instruct him in the course of his negotiations on your behalf, to ascertain what the fee would be, what the charge would be?

A. No, sir, I did not. The time was very short.

Q. The fact of the matter is you did not even go so far as to ask Dr. Donovan whether he needed any money to fly to Tucson and perform the operation?

A. The suggestion was made to Dr. Thompson, I believe it was, that I would be very glad to get Dr. Donovan's tickets for him, and I asked that question.

Q. I ask the question be repeated and that you answer it.

The Court: Speak louder, Mr. Jeffcott. I have difficulty in hearing you.

The Reporter: (Reading)

Q. The fact of the matter is you did not even go so far as to ask Dr. Donovan whether he needed any money to fly to Tucson and perform the operation?

A. It is difficult for me to answer that question, because in one sense I did. In a sense I asked Dr.

(Testimony of David C. Jeffcott.)

Thompson to convey the information that I would be glad to get Dr. Donovan's tickets for him.

Mr. Allen:

Q. After he arrived here, you made no mention to Dr. Donovan about paying his expense or making any advance on account [15] of his expense, did you?

A. Had I been able to see Dr. Donovan—that is not a clear representation of what I mean. Had Dr. Donovan and I been able to get together, because of the circumstances, I most certainly would have said that to him.

Q. Your answer is that if he had come to you, you would have brought the subject up?

A. No, sir, that is not my answer. My understanding was that Dr. Donovan was to take a plane Monday night from Tucson. I had other business and was forced to leave Tucson Sunday evening, to return Monday. I told my wife and the others I would be back Monday noon. To the best of my knowledge, I was back before noon, very shortly after Dr. Donovan was forced to leave at an earlier date. I had planned that afternoon to go into it with Dr. Donovan.

Q. Now, shortly after the operation, you received your statement from Dr. Donovan, did you not?

A. Shortly? I don't remember the date, sir, but I think approximately—I don't remember the day or date, but it was within a month, I think.

Q. Anyhow, he sent you a statement?

(Testimony of David C. Jeffcott.)

A. Yes, sir.

Q. In that statement, he indicated his total charge, including his expenses and his fee, was twelve thousand five hundred dollars, did he not?

[16]

Mr. Robertson: If the court please, I object to the question, because the statement would be the best evidence, and I have it here available and will produce it for counsel, if he wants it. And I might call the court's attention to the fact that the statement does not indicate what Mr. Allen just said.

Mr. Allen: I will withdraw the question.

Q. I ask you to examine this document, Mr. Jeffcott.

A. Yes, sir.

Q. You recognize that, do you not?

A. Yes, sir.

Q. And that document—withdraw that. Do you know anything about this pencil mark on the statement?

A. Yes, sir, that is in my handwriting, and also the ink.

Q. Aside from the pencil and ink marks thereon, this document constitutes a statement rendered to you by Dr. Donovan?

A. Yes, sir.

Mr. Allen: I offer it in evidence.

Mr. Robertson: No objections.

The Court: It may be admitted and marked. [17]

(Statement marked as Plaintiff's Exhibit No.

1.)

(Testimony of David C. Jeffcott.)

[Plaintiff's Exhibit No. 1 is set out at page 8 of this printed record.]

Mr. Allen:

Q. Now, you say you received that statement approximately, or within a month after the operation was performed?

A. Yes, sir, the date of the bill was May first.

Q. And how long did you wait thereafter before communicating to Dr. Donovan, or with Dr. Donovan, in regard to that statement?

A. I do not recall, sir, except it was not immediately.

The Court: What is that, Mr. Witness?

A. I don't recall how long I waited after receiving Dr. Donovan's bill, except I did not answer it immediately.

Mr. Allen:

Q. Was it as much as three or four weeks later-

A. Yes, sir, I think that is conceivable.

Mr. Allen: May I have this marked for identification?

(Letter marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Allen:

Q. Mr. Jeffcott, I hand you plaintiff's Exhibit 2 for identification, and ask you to examine the same and [18] state whether or not you recognize what that document is. A. Yes, sir.

Q. It is a letter which you wrote entirely in your handwriting? A. Yes, sir.

(Testimony of David C. Jeffcott.)

Q. A letter in which you made the first reply to Dr. Donovan relative to that statement?

A. Yes, sir.

Q. And a letter in which you discuss the statement and his charge? A. Yes, sir.

Mr. Robertson: If the court please, the letter speaks for itself.

Mr. Allen: I offer it in evidence as Plaintiff's Exhibit 2.

The Court: Any objection to it, Mr. Robertson?

Mr. Robertson: Just a moment. No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 2 for Identification, a letter, admitted and marked Plaintiff's Exhibit 2.)

[Plaintiff's Exhibit No. 2 is set out at page 8 of this printed record.] [19]

Mr. Allen: May I read this letter to the court at this time, or does the court prefer to read it himself?

The Court: If there is any occasion to read it at this time, you may do so.

Mr. Allen: I wish to examine the witness in reference to some of the comments in the letter.

Mr. Robertson: I request that Mr. Allen read the letter to your Honor.

The Court: Go ahead.

(Thereupon Mr. Allen read Plaintiff's Exhibit 2.)

(Testimony of David C. Jeffcott.)

Mr. Allen:

Q. Now, Mr. Jeffcott, there is no doubt in your mind, is there, but that, as stated in this letter, Plaintiff's Exhibit 2, Dr. Donovan did provide a wonderful service for you and your wife in operating successfully upon your son, Robert?

A. Yes, sir.

Q. You do not question that, do you?

A. No, sir. There are no grounds on which I could question it. [20]

Q. Now, in that regard, Mr. Jeffcott, how many children did you have after the birth of Robert?

A. After the birth of Robert, sir, none.

Q. How many children in all do you have?

A. We now have three, sir.

Q. The first two were girls?

A. Correct, sir.

Q. And this is—What is your father's name?

A. My father's name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father's first grandson, isn't that correct?

A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather——

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

(Testimony of David C. Jeffcott.)

The Court: Unless you make a showing as to the materiality, it is not admissible. [21]

Mr. Allen: It is a foundational question leading up to the consideration of the wealth of the Jeffcott family and the importance of this male son in the light thereof, and there seems to be no question but that the seriousness of the operation is a matter that can be taken into account in determining the cost of an operation, just as it seems to be the better line, and now almost universally recognized line of authority that the financial ability or wealth of the parents themselves or the child may be taken into consideration, not only by the surgeon in determining his fee, but by the jury and court.

The Court: I understand that principle but this seems to be a remote situation, so far as the grandfather is concerned.

Mr. Allen: So far as the responsibility placed upon the surgeon in performing this operation, I think he is entitled to bring out any particular aspect which would place an out-of-the-ordinary responsibility as to the particular infant, and that is the theory on which it is offered. It is offered to show that this particular infant was of outstanding importance and consequently the operation upon him would result in a larger degree the feeling of responsibility upon the surgeon. In other words, it is one of the elements that shows or tends to show the relation between [22] these parties in this employment, and the very nature of the employment.

(Testimony of David C. Jeffcott.)

There is a great difference in operating on one infant and another, so far as the responsibility on that surgeon is concerned, because aside from the fact that every man is deemed to have a high degree of affection for and high degree of interest in his offspring, certainly there can be circumstances which make a particular child of outstanding importance to his parents.

Mr. Robertson: I think this child was just about as important to Mr. and Mrs. David C. Jeffcott as any child ever born, but I do not see how that could make this line of testimony material. It might cast a sentimental reflection upon the lawsuit, to say that the child was named for its grandfather. He is the only male grandchild, and for that reason he may perhaps be worth a little bit more to Mr. and Mrs. Jeffcott, but we are in a court of law now, determining what is a reasonable fee for the operation, and unless the grandparents, uncles or aunts or someone else has some financial responsibility for the payment of this fee of twelve thousand five hundred dollars, what their financial circumstances are is immaterial. It is solely a question of the financial ability of those who are responsible for the payment of the bill, and I join with Mr. Allen in saying that the modern trend of authorities is not only that you may inquire [23] into the financial responsibility of the parents, but also of the doctor who performs the operation, and I renew my objection to the question.

(Testimony of David C. Jeffcott.)

The Court: I shall permit the question to be answered and reserve the ruling as to the admissibility.

The Reporter: (Reading)

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

A. I am not quite clear on my dates, but unless I am mistaken, my father was in New York—pardon me—New Jersey, for some little time before the baby was born and after he was born. I presume he felt the normal reactions of any grandfather.

Mr. Allen:

Q. He communicated to you the hope, did he not, that he was in hopes that this prospective child would be a male child?

Mr. Robertson: The same objection.

The Court: The question may be answered.

A. I do not recall that such a statement was ever made, sir.

Mr. Allen: You knew that such was the case, didn't you? [24]

A. I think most parents realize that most grandfathers wish boys, for some reason. I like girls.

Q. You made it known, stated to these physicians who were in attendance upon your wife and your son at the time of childbirth that such were the conditions?

Mr. Robertson: Moreover, if your Honor please,

(Testimony of David C. Jeffcott.)

any expectations or hopes or fatherly wishes that Mr. Dave Jeffcott may have had, would hardly heap any greater responsibility upon Dr. Donovan. I presume he has the same desire to save the life of any child he operates upon. It seems entirely immaterial.

The Court: The witness may answer the question.

A. I am not quite clear what these conditions are.

Mr. Allen:

Q. You told the physicians of Tucson, Arizona, that were on the case that that child, Robert, was extremely important, because he was the first male grandson, did you not?

A. After or before the child was born, sir?

Q. Did you at either time tell them so, I asked you in connection with the child's birth.

A. If I did, it was no more than I think any parent would [25] have done under the circumstances, had the baby been well or sick.

Q. On May 22, 1939, when you wrote Plaintiff's Exhibit 2 to Dr. Donovan, it is correct that at that time you and your wife owned and were operating a cattle ranch near Patagonia?

A. Yes, sir.

Q. What is the extent of your holdings down there, Mr. Jeffcott?

A. At the present time?

Q. What were they on May 22, 1939?

A. I am sorry, I can only give you a rough idea

(Testimony of David C. Jeffcott.)

of what that was, because I have been adding to it, or trying to, through natural increase born on the ranch. In land, at that time and at the present, I have a forest permit for 477 head of cattle. In addition, I have approximately sixty-five hundred acres of deeded land.

Q. How many cattle did you own at that time?

A. Sir, without reference to my books, I would be unable to answer that question accurately, and I would prefer to answer accurately.

Q. They were all top quality cattle, were they not?

A. No, sir, they were not.

Q. And at that time you regarded that that ranch set-up was worth one hundred and fifty thousand dollars?

A. I think that is correct, yes, sir.

Q. And it is also correct that whatever encumbrance you [26] had against it was in favor of your mother, was it not?

A. No, sir, that is not correct.

Q. In the main, she held whatever mortgages were on that property, did she not?

A. No, sir, she did not.

Q. Does she at the present time?

A. Yes, sir.

Q. At the present time, she holds practically all of the encumbrance against it, does she not?

A. Yes, sir.

Q. And your father and mother made a very substantial investment in that property, in the form of

(Testimony of David C. Jeffcott.)

the erection of extensive and expensive dwellings soon after this operation, did they not?

Mr. Robertson: I object to the question unless Mr. Allen lays the foundation that any improvements made by way of buildings upon the property belonging to Mr. Dave Jeffcott enhances the value of Mr. Dave Jeffcott's holdings.

Mr. Allen:

Q. My question is whether or not he did not build it upon this defendant's property.

A. May I ask that that question be repeated.

The Reporter: (Reading)

Q. And your father and mother made a very substantial in- [27] vestment in that property, in the form of the erection of extensive and expensive dwellings soon after this operation, did they not?

Mr. Allen:

Q. I refer to the property owned by you and Mrs. Jeffcott.

A. The answer is no, sir.

The Court: What is your answer, Mr. Witness?

A. No, sir.

Mr. Allen:

Q. Did you and Elsie Jeffcott deed to them a portion of your holdings and they built upon that portion?

A. Yes, sir.

Q. Now, I want to ask you to state, Mr. Jeffcott, what you have paid to your mother on account of the mortgage which she holds, since she took that mortgage?

A. I am sorry I don't have my books with me

(Testimony of David C. Jeffcott.)

this morning. I did not expect to be called, and I prefer not to answer that question until I look at my books.

Mr. Allen: May I have just one moment, your Honor?

The Court: We might pause for a moment.

Mr. Allen:

Q. Now, have you paid anything to Dr. Donovan on account of [28] his services in the performance of this operation? A. Have I, sir?

Q. Yes.

A. Yes, twenty-five hundred dollars.

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?

Mr. Robertson: I object to that question and object to a question being asked in a court where Mr. Allen very well knows that unless the grandfather of this baby, in some written obligation, has agreed to pay for this operation, he is under no financial responsibility for it, and is certainly not admissible in this lawsuit. He knows that the other doctor, Dr. Hugh Thompson, employed Dr. Donovan. I object to the question and would request the court to instruct counsel that any such line of inquiry is not proper in this action.

Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the

(Testimony of David C. Jeffcott.)

mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it.

Mr. Robertson: The very fact it might be the natural line of inheritance unfortunately does not guarantee to Mr. Dave Jeffcott that he will inherit any of such money.

The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of this child to the parents.

Mr. Robertson: The parents are the only defendants in the action, and we must confine the evidence that is introduced in this case to the parties that are in this case.

The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved.

The Reporter: (Reading)

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it [30] is a fact, is it not, that your

(Testimony of David C. Jeffcott.)

father, Robert Crawford Jeffcott, is an extremely wealthy man?

A. I have done quite a lot of work with figures in my life and had I ever seen any figures on my father's wealth or lack of wealth, I would be able to answer that question, but truly I do not know what his wealth consists of. I have never been taken into his confidence, nor to my knowledge has anybody else, as to what he has, has had, or will have, or has now.

Mr. Allen:

Q. Nevertheless, you regard him as a man of very substantial means, do you not?

A. I have lived in the family quite a while and I know it has always been told to me how hard times were, and we have been instructed to be thrifty.

Q. Answer the question. Do you or do you not regard your father as a man of substantial means?

Mr. Robertson: Mr. Allen is adopting the same terms we find in the complaint. He says "a man of substantial means." In the complaint he says "a reasonable fee of twelve thousand five hundred dollars". What is "reasonable"? What is "substantial"? What might be a whale of a lot to someone else might be a "reasonable" fee to another.

The Court: Answer the question. [31]

A. Sir, I find it exceedingly difficult to answer that question, because what does constitute reasonable wealth? If somebody said to me a man has

(Testimony of David C. Jeffcott.)

an annual income of a million dollars a year, I would understand that. I do not know what my father's income is. I know he has had things that have seemed to cost a lot of money, and I have also heard they were mortgaged heavily, and I don't know.

Mr. Allen:

Q. One of the things that seemed to cost a lot of money is a yacht upon which he employed a very extensive crew?

Mr. Robertson: May I have a continuing objection?

A. Yes, sir, I believe you are correct that on the face of it that appeared to be true.

Mr. Allen:

Q. And you would not say that those mansions he built down close to your ranch home are paid for with chicken feed, would you? A. No.

Q. He has a very substantial investment there, for a place to live, has he not?

A. I do not know the cost of that. I could guess, but I do not know.

Q. What would be your guess? [32]

A. Anything from fifty thousand to two hundred thousand.

Q. And now it was your father, Robert Crawford Jeffcott that you contemplated having engage his physician, Dr. Palmer, to put the pressure on Dr. Donovan, if he objected to coming to Tucson?

Mr. Robertson: Object to the question. The wit-

(Testimony of David C. Jeffcott.)

ness has stated that he made no such statement, and that it is against his principles to do such a thing.

Mr. Allen:

Q. I qualify my question that if he made such a request, he is bound to have contemplated that his father, through Dr. Palmer, would put the pressure on.

Mr. Robertson: I object to the question because it is argumentative—if you do thus and so.

Mr. Allen: It is cross-examination, your Honor.

The Court: Objection sustained. Go ahead.

Mr. Allen:

Q. If you made any such statement to Dr. Thompson, Mr. Jeffcott, whom did you contemplate would put the pressure on Dr. Donovan? [33]

Mr. Robertson: Same objection. It still constitutes a very argumentative form of question. The witness has said that he did not make such a statement. You cannot state if I took a pot shot at the President of the United States, what would be my frame of mind.

Mr. Allen: He has testified that he cannot remember whether he made such a statement, and that he did not think he would have made such a statement, and I brought out that he just did not think he made such a statement, and now I ask him how he would have gone about putting pressure on Dr. Donovan.

The Court: Answer the question.

A. In the first place, I had never heard of Dr.

(Testimony of David C. Jeffcott.)

Donovan before, and in the second place, I did not know for whom he worked or where he worked. If I had made such a statement, and I don't believe I did, I do not know how I would have gone about it, because I am not in the habit of doing those things. I can do it on my ranch, of course, but I am not acquainted with Dr. Donovan and I do not know Dr. Palmer well.

Mr. Allen:

Q. You know that he has been your father's attending physician [34] for many years, do you not?

A. I know Dr. Palmer because Dr. Palmer has seen me upon two or three occasions, but you don't put pressure on your friends like that.

Q. You lived in New York for quite a length of time during your life, have you not?

A. No, sir.

Q. Do you mean to say you have never lived there?

A. For over a period of three weeks, I don't think I have ever been in New York. My home is in New Jersey.

Q. You have been more or less familiar with the city of New York during much of your lifetime, have you not?

A. As anybody who would live in Patagonia would be familiar with Tucson.

Q. In the course of that familiarity with the City of New York, you have also gained a pretty good idea that fees for professional services in New

(Testimony of David C. Jeffcott.)

York, as compared to fees in small communities in the country, are high, have you not?

A. No, sir, I have had very little experience with that.

Q. You have had some experience in employing specialist surgeons in your life, have you not?

A. To my knoweldge for myself I never have employed them.

Q. You have been under the care of specialist surgeons during your life, have you not?

A. Your Honor, may I repeat the operations I have had in my life, to clarify that? It is not clear the way I have to answer that. [35]

The Court: The only question called for just a "yes" or "no" answer, I think.

A. I think the answer would be "yes."

Mr. Allen:

Q. And you know also that those surgeons or that surgeon were or was paid a substantial fee for the specialized care you received?

Mr. Robertson: Once again I object to the word "substantial". Mr. Allen might ask the nature of the operation and the amount paid and leave it up to the court as to whether it was substantial.

Mr. Allen: I don't think I am limited to such strict wording on cross-examination.

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. And you know also that those surgeons or

(Testimony of David C. Jeffcott.)

that surgeon were or was paid a substantial fee for the specialized care you received?

A. To the best of my recollection, the fees were reasonable.

Mr. Allen:

Q. Now, what were your intentions in reference to Dr. [36] Donovan's charges when you sent him the twenty-five hundred dollars?

A. I don't remember exactly at the moment what I wrote Dr. Donovan when I sent him that check, but as I recall my intentions at that time, and I believe I indicated them in that letter, or previous ones, that was the extent of our ability to pay him at that time, and that some time at a later date, we perhaps would be able to pay him more.

Q. That was not until August 14, 1939, that you finally transmitted that partial payment, was it?

A. I think that is the date.

Q. And you wrote a letter of transmittal at that time, did you not?

A. Yes, I sent a letter with it.

(A two-page letter marked Plaintiff's Exhibit No. 3 for Identification.)

Q. I hand you Plaintiff's Exhibit 3 for Identification, and ask you to examine that and state whether or not that is the letter with which you transmitted the payment of twenty-five hundred dollars.

A. Yes, sir, that is the letter I wrote him.

Q. And that bears your signature, does it not?

A. Yes, sir, that is my letter.

(Testimony of David C. Jeffcott.)

Mr. Allen: I offer this letter as Plaintiff's Exhibit 3. [37]

Mr. Robertson: No objection.

The Court: All right. Admitted.

(Letter, Plaintiff's Exhibit 3 for Identification, marked as Plaintiff's Exhibit 3 in evidence.)

[Plaintiff's Exhibit No. 3 is set out at page 11 of this printed record.]

Mr. Allen:

Q. As a last paragraph there, Mr. Jeffcott, you stated or wrote to Dr. Donovan at that time the following, did you not? I will ask you to read the last paragraph of that letter.

A. Aloud or to myself.

Q. Aloud.

A. (Reading): "I feel very unhappy that any question of cost should enter into what you did for our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it I would like to do some more for you in

(Testimony of David C. Jeffcott.)

order that you would [38] think as well of us as we did toward you."

Q. That is a correct reading of the last paragraph of that letter?

A. I think so, sir.

Q. Now, after you sent that communication, you had some further communication with Dr. Donovan, did you not?

A. I believe I received a letter from Dr. Donovan to the effect that he had received my check, but of course could not accept that for full payment, and I believe I answered that. I am not sure on that score.

Q. You made no demand upon him to return the twenty-five hundred dollars after you received such letter? A. Not to my knowledge, sir.

Mr. Allen: That is all the cross-examination of this witness, your Honor.

The Court: Does counsel desire a recess of about five minutes?

Mr. Allen: If we may, your Honor.

The Court: We will take a ten-minutes recess.

(After a short recess, the hearing was resumed.) [39]

Mr. Allen: May I have the privilege of qualifying one further article of correspondence by this witness while he is on the stand?

The Court: Go ahead.

(Letter, David C. Jeffcott to Arthur T. Schmidt, marked Plaintiff's Exhibit 4 for Identification.)

(Testimony of David C. Jeffcott.)

Mr. Allen:

Q. I hand you Plaintiff's Exhibit for Identification No. 4 and ask whether or not you wrote that communication and signed the same.

A. Yes that is mine.

Mr. Allen: I offer it in evidence as Plaintiff's Exhibit 4.

Mr. Robertson: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 4 for Identification, a letter, admitted in evidence and marked Plaintiff's Exhibit No. 4.)

[Plaintiff's Exhibit No. 4 is set out at page 14 of this printed record.]

Mr. Allen:

Q. Now, the truth of the matter about your decision to have Dr. Donovan come to Tucson is——

[40]

The Court: What is your question, Mr. Allen?

Mr. Allen: I have not completed it.

Q. The truth of the matter about your decision to have Dr. Donovan come to Tucson rather than to have this operation in New York was that it was easier and more convenient to you. Is that correct?

A. To me, personally?

Q. That you regarded it as more convenient, that it would be easier.

A. As a matter of fact, I had been looking forward to that trip to New York.

Q. You stated in this letter, Plaintiff's Exhibit 4, did you not, that that was the reason?

(Testimony of David C. Jeffcott.)

Mr. Robertson: May I suggest that the witness be shown the letter in connection with the question.

Mr. Allen:

Q. I call your attention to the third paragraph of that letter.

A. May I read this aloud?

Q. Yes.

A. (Reading): "Contrary to your advice there was no feeling that the child couldn't go to New York or elsewhere, but it seemed easier and more satisfactory for the doctor to [41] come here than for the child and a nurse to go to the doctor."

Q. In other words, your decision in that respect was made as one of convenience, wasn't it?

A. I believe that I used that word in there, yes, sir, that it would be more convenient, that more people would not be drawn out of *out of* their normal schedule if the doctor came here.

Q. What I am getting at is that those were the elements that caused you to make that decision, rather than any feeling that the child might not survive the trip to New York, or might not survive the operation if the trip were made.

A. There were many things that entered into that decision. That was written nine months later and during nine months many things developed that never came out at the moment the decision was being made.

Q. Now, do you still expect to have Dr. Dono-

(Testimony of David C. Jeffcott.)

van perform any further surgery that may be needed by your son?

Mr. Robertson: We object to that question. Certainly it is beyond the scope of this case. Surely since that letter was written, the relations between Dr. Donovan and Mr. Jeffcott could hardly be as friendly, and to ask Mr. Jeffcott on the stand even right now whether he expects to have Dr. Donovan perform a simple hernia operation is rather beyond the scope of the case. [42]

Mr. Allen: I withdraw the question rather than argue about it.

Q. You did indicate in that letter of March 2, 1940, that you still intended to have Dr. Donovan perform the further surgery that might be needed by your son?

A. I think that is a natural conclusion. If Dr. Donovan did the first operation, I think he should do the second.

Q. You did so advise him at that time?

A. I advised Dr. Donovan?

Q. Or his attorney, Mr. Schmidt.

A. I believe I wrote that in the letter.

Q. Was that written in there by way of an expression of your high regard of his ability as a surgeon?

A. I think so, yes, sir.

Examination

By Mr. Robertson:

Q. If you should have Dr. Donovan perform the

(Testimony of David C. Jeffcott.)

operation you have referred to, would you leave it to a reasonable fee, or have an agreement as to the fee?

A. With several years, rather than a very few hours, to make a decision, of course it would be an agreed amount.

Q. You would not leave it up to the doctors on the case to conduct the negotiations for you?

A. When I have any knowledge, I had rather conduct them myself.

Q. Now, Mr. Jeffcott, I would like you to read Plaintiff's [43] Exhibit 3 and Plaintiff's Exhibit 4.

A. This carries my letterhead, and is dated Patagonia, Arizona, August 14, 1939.

(The witness thereupon read Plaintiff's Exhibit 3.)

This other letter is with my letterhead, dated March 2, 1940, to Arthur T. Schmidt.

(The witness thereupon read Plaintiff's Exhibit 4.)

Q. Those letters, Mr. Jeffcott, were written before this suit was instituted? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. Prior to the time you received Dr. Donovan's bill for twelve thousand five hundred dollars, shortly after the first of May, did you have any preconceived idea of your own as to what the fee would probably amount to? A. Yes, sir.

Q. And did you have such an idea at the time

(Testimony of David C. Jeffcott.)

you consented to Dr. Thompson employing Dr. Donovan, or a general idea or figure in your mind?

A. Yes, sir, I had a figure in my mind.

Q. What was that figure?

Mr. Allen: I object to that, your Honor, as beyond the scope of cross-examination of this witness, and further that it was not disclosed in any of these letters. It is absolutely immaterial as to what he had in his mind. [44]

Mr. Robertson: It is just as material as the subsequently acquired idea that Dr. Donovan had that the services were worth twelve thousand five hundred dollars. There was no meeting of minds and consequently it is to be left up to the court to decide. The ideas that the respective parties had is to be considered in determining a reasonable fee. They lay stress on the fact that Mr. Jeffcott permitted Dr. Donovan to be employed. What he expected the bill to be when he did this or did that are matters which the court should consider along with the other evidence in the case.

Mr. Allen: I interpose a further objection, your Honor, that only experts are qualified to testify as to the reasonableness of the fees of a surgeon. I make that objection, and the additional objection that the question calls for an answer wholly immaterial, and that the witness is not qualified as an expert.

Mr. Robertson: I agree with Mr. Allen that only doctors are permitted to answer hypothetical

(Testimony of David C. Jeffcott.)

questions as to the value of services, but the defendant in the case and the person who employed the doctor, when asked "Why did you permit Dr. Donovan to be employed", should be permitted to state what his expectations were, I think. [45]

The Court: I am going to sustain the objection. I do not think the plaintiff would be bound by what was in the mind of the defendant here at the time the services were rendered.

Mr. Robertson: If that be true then we are not to be bound by anything that might have been percolating in the mind of Dr. Donovan. The ideas of both parties as to what constitutes a reasonable fee for the services are material. As to whether or not they are controlling, that goes to the weight of the testimony. Mr. Jeffcott is asked why he permitted Dr. Donovan to be brought out here, whether it was fear that the life of the child might be jeopardized, and now I can ask what fee he contemplated paying, and then they can go into the background as to why Mr. Jeffcott thought such a fee was reasonable, and that this fee of twenty-five hundred dollars which he finally paid to Dr. Donovan was considerably higher than what he anticipated, but it was as a result of the top figure the doctors he consulted in Tucson gave him as a reasonable fee for the services and expenses of Dr. Donovan. Mr. Jeffcott should be permitted to state what he expected the fee to be when he permitted Dr. Thompson to employ Dr. Donovan.

The Court: Of course the whole question, so far

(Testimony of David C. Jeffcott.)

as the compensation of the physician is concerned, is what under all circum- [46] stances was a reasonable fee.

Mr. Robertson: That is correct.

The Court: I do not think the question as to what the defendant had in his mind at the time would be an element in determining what a reasonable fee would be, and I am sustaining the objection, Mr. Robertson.

Mr. Robertson:

Q. As stated in your letter, Mr. Jeffcott, before sending this check to Dr. Donovan, did you discuss this matter with physicians and surgeons in Tucson? A. Yes, sir.

Q. As stated in your letter, was the figure of twenty-five hundred dollars the highest figure that any one of those doctors gave you?

A. Yes, sir.

Mr. Allen: Object to that as calling for a hearsay statement.

Mr. Robertson: It is brought forth in an exhibit introduced by the plaintiff.

Mr. Allen: The exhibit speaks for itself. [47]

Mr. Robertson: I am not asking for the statement made, but asking if it is the highest figure that he secured from any doctor.

Mr. Allen: It is permitting hearsay from someone else as to the amount of the fee, without an opportunity for the court to inquire as to their knowledge. Hearsay is not limited to statements

(Testimony of David C. Jeffcott.)

but actions and everything else. The question is whether it is introducing through this witness the evidence of some other witness, some other person.

The Court: What is the answer?

The Reporter: (Reading)

Q. As stated in your letter, was the figure of twenty-five hundred dollars the highest figure that any of those doctors gave you?

A. Yes, sir.

Mr. Robertson:

Q. Immediately prior to the time when Dr. Donovan was called to come to Tucson, and on the day of his arrival, what was your state of mind, so to speak? Were you calm or were you disturbed?

A. I was very much disturbed, as would be fitting a layman who had no ideas of any such thing, or ever even conceived of their happening. [48]

The Court: A little louder.

A. I was very much upset, as I believe any layman who had no knowledge of things like that ever happening in the case of children that were born.

Mr. Robertson:

Q. And upon whom did you rely for advice as to what the baby needed, and what should be done?

A. I believe more than any other doctor upon Dr. Hugh Thompson.

The Court:

Q. Who is that? A. Dr. Hugh Thompson.

Mr. Robertson:

Q. Dr. Hugh Thompson was the staff doctor of

(Testimony of David C. Jeffcott.)

the Desert Sanatorium who was taking care of the child after its birth?

A. Yes, sir, of necessity, the doctor being there in the sanatorium and my wife being there and the baby there, we would, of course, see more of him than any other doctor.

Recross Examination

By Mr. Allen:

Q. This letter, Plaintiff's Exhibit 4, which you wrote to Mr. Arthur T. Schmidt, as you state therein, was by way [49] of belated reply to his letter of December 6, 1939. That is correct, is it not? I refer you to the first paragraph therein.

A. "Because it seemed to me that my letter of August 14th last fully covered the matter, and because I wanted to think this matter over further, I failed to reply to your letter of December 6th, last."

Q. Continue.

A. "Your letter of February 10th seems to intimate that my August 14th letter was not clear. Of course I want the matter amicably adjusted—that was the reason for my sending Dr. Donovan check for \$2500, when my advisers were telling me that such an amount was a considerable overcharge."

Q. Do you have in your possession Mr. Arthur T. Schmidt's letter of December 6, 1939?

(Letter produced by Mr. Robertson.)

Mr. Allen: I would like to offer that in evidence.

(Testimony of David C. Jeffcott.)

The Court: Has it been marked yet?

The Clerk: Plaintiff's Exhibit 5.

Mr. Allen: If your Honor please, I would like to call Dr. Hugh Thompson next, and I talked to him during this brief [50] recess and he had three patients in his office, and asked if he might appear at two o'clock. I suggest that we take our noon recess at this time.

(Thereupon the court took a recess until the hour of two o'clock in the afternoon, at which time the trial was resumed.)

DR. HUGH THOMPSON

called as a witness herein on behalf of the plaintiff, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Allen:

Q. Your name is Hugh C. Thompson?

A. That is right.

Q. Where do you reside, Dr. Thompson?

A. Tucson.

Q. San Clemente Addition? A. Yes.

Q. You are a licensed and practicing physician within the state of Arizona? A. Yes, sir.

(Testimony of Dr. Hugh Thompson.)

Q. How long have you been engaged in practice in Arizona? A. Since January, 1939. [51]

Mr. Robertson:

Q. Pardon me, what was that date? 1939?

A. Yes.

Mr. Allen:

Q. Where were you engaged in practice prior thereto? A. Albany, New York.

Q. Are you acquainted with the plaintiff in this action, Dr. Edward J. Donovan? A. I am.

Q. Are you acquainted with the defendants in this action, Mr. David C. Jeffcott and Mrs. Elsie Jeffcott? A. I am.

Q. What was your professional employment, if any, on or about the 24th of March, 1939?

A. I was on the staff of the Desert Sanatorium.

Q. To what extent was your professional time occupied by such employment?

A. Completely.

Q. You were devoting your time wholly to acting as a member of the staff of that sanatorium or hospital? A. That is right.

Q. Did you have any connection, any professional connection, with the case of Robert Jeffcott, the infant son of these defendants?

A. Yes, sir, I attended the child.

Q. When did your professional attention to that case begin, Dr. Thompson? [52]

A. A few hours after its birth.

Q. Where was that child, Robert Jeffcott, born?

A. At the Desert Sanatorium.

(Testimony of Dr. Hugh Thompson.)

Q. And who, if you know, was in attendance upon Mrs. Jeffcott as her physician?

A. Dr. William Carrell.

Q. Will you state what, if any, particular or specialized field of professional work you were doing at the sanatorium?

A. Largely pediatrics.

Q. Will you state, Dr. Thompson, what occasioned your being called on to, or assigned to the case of the Jeffcott baby?

A. Dr. Carrell asked me to see the baby several hours after birth, because it had an intestinal hemorrhage.

Q. How long thereafter did you continue on the case of the Jeffcott baby?

A. For approximately six to eight months.

Q. Now, will you describe to the court what attention you or other physicians in your presence extended to the Jeffcott baby during the first six or seven days of its life, including (if I may interrupt, Dr. Thompson) you might as well include in that statement, a statement of the condition of the child.

A. At birth the baby had seemed perfectly normal. A few hours after birth, it vomited, which in itself is not remarkable. A few hours later it passed blood by rectum in sufficient amount to be definitely

[53]

abnormal, and it continued to pass blood by rectum intermittently for about forty-eight hours. The child was given blood intermuscularly, that is, into

(Testimony of Dr. Hugh Thompson.)

the muscle, and also was given blood into the veins twice.

Q. During what period?

A. During the first twenty-four hours of life. The child then gradually ceased to bleed but it continued to vomit abnormally. It vomited intermittently up to the time of the operation. On the third, fourth and fifth day, I believe, of life, it passed stools which seemed somewhat normal, but thereafter did not do so, did not pass normal stools. About the fifth day of life, it became evident from the fact that the intestinal contractions became evident through the abdominal wall, it became evident that the child had at least a partial obstruction of the intestines. It was not at that time complete. I judge that because the baby was having some stools. About the 31st of March, that is when the child was seven days old, I felt convinced that the obstruction was not going to be relieved, and because the baby vomited bile instead of simply the contents of the stomach, I felt the obstruction was in the small intestine itself, rather than at the junction of the stomach and intestine, which is the more usual location of obstruction in young infants. During this period, and particularly the last two or three days of this first week of life, the baby had been given a fluid, salt [54] solution and water under the skin and into the vein to maintain its body fluids. On the 31st of March, when I became convinced that the child had an intestinal obstruction of the small intestine which was not going to subside, I com-

(Testimony of Dr. Hugh Thompson.)

municated with Dr. Carrell, the obstetrician, and told him my opinion and my feeling also that the baby would have to be operated upon.

Q. Now, Dr. Thompson, had any other physicians or surgeons been called on to that case up to the seventh day of life of the infant?

A. No, sir.

Q. Was anyone else called at that time?

A. At that time there was.

Q. Who was called?

A. Dr. Vivian Tappan.

Q. What is her specialized field of practice, if any?

A. She is a pediatrician.

Q. Where does she practice?

A. Tucson.

Q. What took place then, Dr. Thompson, after you made this report to Dr. Carrell?

A. There was a consultation between Dr. Tappan, Dr. Carrell and myself.

Q. What was the subject matter of such consultation?

A. First the diagnosis, confirmation of the diagnosis, and second who should be the surgeon.

Q. It was or was not decided at such conference that an [55] operation should be performed?

A. It was so decided and the baby was x-rayed and given a meal by mouth containing barium to show up the point of obstruction, and the point of obstruction was confirmed by x-ray.

Q. When was it that the ultimate decision to operate was reached in relation to the x-ray?

(Testimony of Dr. Hugh Thompson.)

A. Immediately.

Q. What, if anything, was done in the course of the consultation relative to the consideration of who should perform such operation?

A. Dr. Carrell said we would have to obtain someone outside of Tucson, as he felt there was no surgeon in Tucson competent to perform such an operation.

Q. What further took place in that regard?

A. I asked Dr. Tappan whom she would suggest, and she suggested two names, Ladd, of Boston, and Donovan, of New York.

Q. What further took place?

A. I agreed those were the two men I had had in mind and as New York was a little closer than Boston, and as I knew of Dr. Donovan and his work, I felt he would be the logical choice.

Q. What further discussion was had at that time concerning the choice of Dr. Donovan, if any?

A. The three physicians agreed we should recommend Dr. Donovan to Mr. and Mrs. Jeffcott.

Q. Did anything further take place in that conference as to [56] the choice of a surgeon?

A. No, we then went in and communicated our opinion to the parents.

Q. Where did you communicate that opinion to them?

A. In Mrs. Jeffcott's room, as I recall.

Q. In the sanatorium?

A. Yes.

Q. Who was present?

(Testimony of Dr. Hugh Thompson.)

A. Dr. Tappan, Dr. Carrell, Mrs. Jeffcott, Mr. Jeffcott, and I believe a nurse was present.

Q. Mr. Jeffcott was present?

A. I believe he was.

Q. Now, what was done at that conference on the part of you physicians, with the parents?

A. I believe I acted as spokesman for the three physicians, since I had been in charge up to that time. We told them what we considered the nature of the case to be and the necessity for an operation, and who and why we felt should operate on the child, and we were then authorized to go ahead.

Q. Whom did you indicate to them you felt should operate on the child?

A. Dr. Donovan. We told them that so far as we knew there were only two physicians who could do it. I neglected to say that in the conference before we saw the parents, we discussed the possibility of physicians closer to Tucson, and I asked Dr. Tappan if she knew of any physician, [57] any surgeon, on the Coast who was particularly skilled in children's surgery, or in Chicago or St. Louis, and she said she did not, and I did not either.

Q. Did you ask Dr. Carrell's opinion on that point?

A. Dr. Carrell left the choice and all of that up to Dr. Tappan and myself, because he said he was not particularly conversant with children's surgeons.

The Court: Doctor, will you please speak louder. What is that answer?

The Reporter: (Reading)

(Testimony of Dr. Hugh Thompson.)

A. Dr. Carrell left the choice and all of that up to Dr. Tappan and myself, because he said he was not particularly conversant with children's surgeons.

Mr. Allen:

Q. Proceed, Dr. Thompson, to outline what took place in the conference with Mr. and Mrs. Jeffcott.

A. I was authorized to go ahead and communicate with Dr. Donovan. I was selected because I happen to know Dr. Donovan personally.

Q. Who made that selection, Dr. Thompson?

A. Dr. Tappan and Dr. Carrell said "You go ahead", as I recall.

Q. Was any comment made on that suggestion by the parents?

A. No, they agreed to the necessity for an operation and in our choice of a surgeon. It was at that time thought that the baby would be flown to New York by a nurse and a doctor. [58]

Q. That plan was discussed there with the parents, was it? A. Yes, it was.

Q. And that was the plan you were instructed to communicate to Dr. Donovan? A. Yes, sir.

Q. Was anything said by either Mr. or Mrs. Jeffcott at that time with reference to the expense of that procedure? A. No, sir.

Q. Did they make any comment or objection as to the probable amount of fee which would be involved for such surgical attention? A. No, sir.

Q. Did they instruct you at such time to inquire into the matter of the fee? A. No, sir.

(Testimony of Dr. Hugh Thompson.)

Q. What did you do pursuant to carrying out such instructions?

A. I called Dr. Donovan on the telephone, told him the nature of the case, and asked him if he felt our diagnosis was probably correct, told him that we felt that we would like to have him operate on the baby, and that we thought we could fly the baby to New York at that date, arriving in New York the next afternoon, and he said he would meet us at the Babies' Hospital in New York the next morning when we arrived.

Q. At what time of March 31st did that telephone conversation take place, approximately?

A. I would say around eleven o'clock in the morning, some [59] place probably between ten and twelve o'clock.

Q. What next developed within your knowledge in that regard, Dr. Thompson?

A. In the first place, I told the parents and Dr. Carrell that I had made the arrangement. I believe that Mr. Jeffcott inquired at the American Airlines office about reservations, and I made my own personal plans to leave that afternoon on the plane with the child, having talked with Dr. Tappan and found she was not particularly desirous of making the trip. We talked with the nurse who said that she could go, and we were making plans to depart that day.

Q. Then what, if anything, developed during the course of those plans?

(Testimony of Dr. Hugh Thompson.)

A. I met Mr. Jeffcott and he asked me if I thought Dr. Donovan would come out to Tucson.

Q. What response did you make, if any?

A. I said I would have to communicate with him and find out whether he would consider making the trip and at that time I asked him if money was any object to him in making the arrangements.

Q. What response, if any, did he make?

A. He said "No".

Q. What instructions, if any, did he give you at such time in reply to negotiating with Dr. Donovan to come to Tucson? [60]

A. He asked that I call Dr. Donovan again and see if he would come out immediately to Tucson.

Q. What was done as a result of that conversation?

A. I called Dr. Donovan on the telephone and asked him if he would come out. Dr. Donovan said first that he had never flown out, but did not say he would not come. I told him then that Mr. Jeffcott had said that money was no object, and that we would like very much to have him come.

Q. What response then, if any, did he make?

A. He said he would come and he did.

Q. Do you remember, Dr. Thompson, whether any conversation was had between you and Dr. Donovan at such time relative to his means of transportation and his connections?

A. Yes, we mentioned that there was a plane leaving that afternoon, and he said he would do

(Testimony of Dr. Hugh Thompson.)

everything possible to catch it; that he would call the airlines immediately and see if he could get on that plane.

Q. About what time was that second conversation had with Dr. Donovan?

A. I believe about one o'clock p. m. I shall have to confirm that.

Q. You mean mountain time?

A. Yes, our time here.

Q. Do you know what time that plane departed from New Jersey?

A. I think I will have to correct that, Mr. Allen. As I recall, now, I think it was about one p. m. New York time when [61] that second conversation occurred. I believe Dr. Donovan had three or four hours to catch the plane. I think the plane left at five o'clock New York time.

Q. In any event, you discussed his schedule in coming here by plane?

A. Yes.

Q. When did he arrive here, Dr. Thompson?

A. The following morning.

Q. At about what hour, if you know?

A. I think it was about six o'clock. It was either six or eight. I know I met the plane—met him at the plane.

Q. Describe what occurred, what took place thereafter relative to Dr. Donovan regarding surgical attention to the Jeffcott baby.

A. We drove immediately to the Desert Sanatorium from the airport, and in a very short time

(Testimony of Dr. Hugh Thompson.)

Dr. Donovan viewed the x-rays and saw the child. He agreed with the diagnosis and remarked on the way from the airport to the Desert Sanatorium that the chances were it was a volvulus and after he saw the x-rays that impression was strengthened. The baby was operated on that noon. Dr. Donovan performed the operation.

Q. Who was present when the operation was performed, as far as you know?

A. Dr. Victor Gore, Dr. Vivian Tappan.

Q. In what capacity? [62]

A. They were there as observers. Dr. Carrell, Dr. Van Horn as anaesthetist, and myself as assistant.

Q. And the usual retinue of nurses?

A. The nurses were present.

Q. Will you describe the pathology as found in the course of that operation?

A. The intestine was not in the usual position. Ordinarily during the development of a child in the uterus, the intestine which originally is a straight tube, rotates and turns as it grows. Whereas the junction of the small and large intestines is in the right lower part of the abdominal cavity, in this child, apparently due to failure to rotate, it was in the left upper part of the abdomen—in the left upper, instead of in the right lower. Now, the intestine is attached to the back of the abdominal wall by a thin membrane which is called the mesentery. In this case, the intestine had twisted around its

(Testimony of Dr. Hugh Thompson.)

own mesentery, thereby shutting off, to a certain extent, the blood supply and causing what is known as a volvulus or kink and had rotated around its own membrane attachment two and one-half times, two and one-half rotations. In addition there was a failure of the usual connection between the membranous attachment of the stomach and the transverse colon and the first part of the small intestine, which ordinarily does not do so, had passed through the mesentery, of the last part of the small intestine. In addition, there was a firm fibrous [63] band which held down the last part of the intestine, and that band was acting as an obstructive agent, preventing the passage of the intestinal contents through.

Q. What condition did the small intestine appear to be in at the time of the opening of the abdomen?

A. The part above the obstruction was distended and the part below the obstruction was collapsed, owing to the fact that nothing had passed into it for some time prior to the operation.

Q. Was there any indication on the lower part, the collapsed part, which would indicate the extent to which the blood supply had been impaired?

A. The blood supply had definitely not been shut off long enough to kill the intestine. In other words, the intestine was not dead.

Q. Necrosis apparently had not developed?

A. No.

(Testimony of Dr. Hugh Thompson.)

Q. What was the color of the collapsed colon?

A. As I recall, a dusky purple.

Q. What is its normal color?

A. Pinker, lighter.

Q. What was done by Dr. Donovan, with your assistance, for the surgical correction of that mal-rotation?

A. The fibrous band was cut. The intestine was rotated so as to unkink it and the junction of the small and the large intestine was placed down in the right lower part [64] of the abdomen where it belonged and secured there by sutures. The abdomen was then closed with several types of sutures. It was apparent when the band was cut and the obstruction relieved that the obstruction had been relieved, because material passed into the collapsed portion. You could see it begin to expand and the color became normal.

Q. Dr. Thompson, will you explain the further course, or outline the further course of Dr. Donovan's attention to the case?

A. Dr. Donovan remained at the Desert Sanatorium over night and for the greater part of the following day, during which time the condition of the child was in every way satisfactory.

Q. Dr. Thompson, do you know, and if you do know will you state to the court what the custom is among surgeons who do specialized work, with reference to their continuing on a case after the performance of specialized surgery?

(Testimony of Dr. Hugh Thompson.)

A. That obviously depends on whether the surgeon is resident in that town or not. If the surgeon is not resident in that town, they usually return to their own home.

Q. At what point?

A. As soon as they feel the operation is doing satisfactorily, sometimes the same day, within an hour or two.

Q. What is your opinion, Doctor, as to the advisability of Dr. Donovan having remained longer in attendance, taking [65] into consideration the condition of this infant at the time of his departure?

A. I cannot say that it would have altered in any way what happened to the child, nor did any of us at the time see any necessity for his remaining.

Q. In other words, it was satisfactory to all three local attending physicians that he depart at that time and that the child be restored to the care of the local physicians?

A. Yes.

Q. I believe you say you continued on the Jeffcott baby case quite a number of months after the operation?

A. Yes, sir.

Q. Will you explain to the court the post-operative course of such patient, including also any treatment that might have been provided in connection therewith, any examinations which might have been made throwing light on the condition of the baby?

A. For several days post-operatively the baby's condition seemed entirely satisfactory. The child was fed and retained its food normally and passed

(Testimony of Dr. Hugh Thompson.)

normal bowel movements. Because of the danger that the baby might cry and break his wound at the time, the dressings were not changed for the first several days. This was done on the suggestion of Dr. Donovan and is customary. However, despite all of our precautions, the dressings became saturated with urine. On I believe the fifth post-operative [66] day, the temperature of the child went above normal, and that was considered an indication, inasmuch as the rest of the physical examination was negative, for changing the dressings. When this was done, it was discovered that the wound had become infected. At that time the child was seen by Dr. Carrell and Dr. Tappan, as indeed it had been during the entire post-operative course, and the wound infection was given routine surgical treatment. I believe I am correct in saying that at that time also the opinion of Dr. Gore was asked, and at that time the opinion of Dr. Carrell and Dr. Gore were relied upon because they were surgeons and I was not. On the ninth post-operative day, the character of the discharge from the wound, the infected wound, changed and it became evident that there was a communication between the wound and the intestine, a fecal fistula. This condition continued for quite a few days and for a day or two during this time the condition of the child did not seem very good. However, after persistent medical treatment and a good deal of attention to the wound itself to prevent the digestion of the tissues by the

(Testimony of Dr. Hugh Thompson.)

intestinal contents, the discharge of the wound gradually became less and the child's condition improved.

Q. Now, Dr. Thompson, during the post-operative progress and during the care and attention being given to the Jeffcott baby relative to this fecal fistula, did you make any reports to Dr. Donovan? [67]

A. I did. I telephoned him as soon as it became evident and I communicated with him by letter several times during the post operative course.

Q. Did you secure any counsel and professional advice from him in that regard?

A. Yes, I did.

Q. In other words, his attention continued from a consultant's view point throughout the course of that post-operative period?

A. Dr. Donovan was informed fully of everything that happened to the child during its stay in the Sanatorium and gave me advice and suggestions on it.

Q. Now, Dr. Thompson, how long—I withdraw that question. What examinations were made by you or brought to your attention in the form of medical reports throughout the post-operative period which would indicate to you the degree of success of that operation, the extent of recovery of the patient, and at what time were those brought to your attention?

A. The fact that the operation was a success was very clearly demonstrated by the fact that the

(Testimony of Dr. Hugh Thompson.)

child began to eat without vomiting and pass normal stools from the time the operation was performed and thereafter, and without the operation the child would absolutely have died.

Q. Did you make any examination or take any x-rays subsequent to the operation which would indicate the position [68] of the G I organs, the gastric intestinal organs?

A. X-rays were taken a few days after the appearance of the fecal fistula and they were taken simply to determine, if possible, the location of the fistula. X-rays were also taken in Patagonia, in the office of Dr. Minier, by me several months after the child had been discharged from the hospital. The x-rays in the Desert Sanatorium at the time of the fecal fistula consisted in giving barium by mouth. The x-ray in Patagonia consisted in giving barium mixture by mouth. Both of those x-rays revealed without any question the intestines were in their normal location. In other words that the junction of the large and small intestines was in the lower right of the abdomen where Dr. Donovan had placed it.

Q. Now, Dr. Thompson, in your professional opinion, what effect, if any, should the development of that fecal fistula by the Jeffcott baby have upon the reasonableness of the charge for the services of the surgeon? A. None.

Q. When, with reference to that x-ray taken at Patagonia, did you discontinue your attention upon the child in the case?

(Testimony of Dr. Hugh Thompson.)

A. Shortly thereafter.

Q. What would you say as a pediatrician was the general condition of the child at that time, and particularly the condition of its gastric intestinal tract? [69]

A. The condition of the child was excellent. The nutrition was good, and it was doing very nicely. The wound had a pin-point spot from which there was an occasional small amount of drainage at that time. I was subsequently informed——

Q. By whom?

A. ——by Dr. Carrell, I believe, that the discharge had ceased entirely.

Q. How long was that after your last x-ray?

A. I think about two months.

Q. Now, Dr. Thompson, what type of quarters did Mrs. Jeffcott have at the Desert Sanatorium?

A. She had a private room.

Q. How did its rate of cost to the patient compare to other rooms in the Sanatorium?

A. I believe it was one of the better rooms in the surgical division, that is, the division where the obstetrical and surgical patients were kept.

Q. How many nurses were on duty in her attendance and attendance upon the infant, during the time Dr. Donovan was present in Tucson for the surgical attention upon the baby?

A. I am not sure about the nurses in care of Mrs. Jeffcott. There was one private nurse on duty all of the time. In other words, there were day and

(Testimony of Dr. Hugh Thompson.)

night nurses for the baby, and for a time there were two day and two night nurses, special nurses who did nothing else. [70]

Q. Now, subsequent to your negotiating with Dr. Donovan pursuant to those instructions given you by Mr. Jeffcott, by virtue of which Dr. Donovan came to Tucson, rather than the baby going to New York, did either Mr. or Mrs. Jeffcott discuss with you the matter of fee? A. No, sir.

Q. How long have you known Dr. Donovan?

A. I first saw Dr. Donovan in June, 1929, when I was a substitute interne at St. Luke's Hospital. I was subsequently an interne in St. Luke's Hospital, during which time, although I was not on his service, I saw him from time to time.

Q. Now, Dr. Thompson, will you state to the court what, if anything, you know about Dr. Donovan's professional schooling in preparation for his carrying on of his professional activity?

A. I believe he attended the College of Physicians and Surgeons at Columbia University; that he interned at St. Luke's Hospital, and at least one other hospital, and I think at two. That he has practiced continuously since his entrance into practice upon the staff of both St. Luke's Hospital and the Babies' Hospital, in New York, and that for a considerable number of years he has been one of the chief surgeons at St. Luke's Hospital. There are, incidentally, four chief surgeons at St. Luke's.

Q. What does that rank indicate, by way of comparison? [71]

(Testimony of Dr. Hugh Thompson.)

A. Well, it is attending surgeon. You start in as assistant, then to principal, and then you go up to full attending surgeon. Dr. Donovan has been for a number of years an attending surgeon, which means that decision in difficult cases is left to the chief surgeons. He has been the chief surgeon at the Babies' Hospital in New York for at least twelve years, to my knowledge. The Babies' Hospital is the division of the Columbia University and Presbyterian Medical Center where all of the children are cared for.

Q. Pardon me. Had you completed your statement in reference to Dr. Donovan's training?

A. He was associated, I believe, with Dr. Downes, who is one of the first great children's surgeons, and by children's surgeons I mean surgeons who particularly do children's surgery in this country.

Q. Have you any knowledge as to the extent of that association, duration of it?

A. I think I am correct in stating that he was associated with Dr. Donovan when he first practiced surgery. I believe I am correct in that. And he is generally regarded in New York as the leading children's surgeon in the city.

Q. Now, Dr. Thompson, have you specialized in pediatric practice largely since your admission, original graduation and admission to practice?

A. Yes. [72]

Q. I ask you to state whether, in the course of your practice, you have been accustomed to attend

(Testimony of Dr. Hugh Thompson.)

district meetings or national meetings of any pediatric societies or organizations.

A. Yes, I have.

Q. Please state what meetings of that character you have attended.

A. American Academy of Pediatrics, of which I am a member, with one or two exceptions, since 1935. I have also attended two national conventions of the American Medical Association and numerous district and state meetings.

Q. Has it come to your attention through the course of your attendance at such meetings, to what extent Dr. Donovan's eminence in pediatric surgery is known and to what extent recognized?

A. He is recognized nationally.

Q. Do you know whether he has any connection with the faculty of Columbia University?

A. Yes, I believe that he is a clinical professor of surgery or professor of clinical surgery, I am not sure which.

Q. In the course of your medical study, Dr. Thompson, either before you were licensed, or in the course of your practice as a pediatrician, have you had occasion at any time to consider the writings of Dr. Edward J. Donovan on pediatric surgery?

A. Yes, I have read several articles by him.

Q. I will ask you to state whether you have had occasion to [73] consider and read any case records written by him?

A. Yes, I have.

Q. I ask you to state what those might indicate

(Testimony of Dr. Hugh Thompson.)

to you, with reference to his ability or standing, if anything.

A. They indicate that his standing is very excellent. The only way to judge that—it is rather difficult to judge—is the quality of publications in which the articles appear, and he has, for instance, contributed to the American Journal of Diseases of Children, which is certainly one of the two best pediatric journals in the world, and he has, I believe, in fact I know he has written a contribution for the Nelson's System of Surgery, which is one of the outstanding systems of surgery in the English language.

Q. What is the name of that last publication?

A. Nelson's Loose-leaf Surgery.

Q. That is in the nature of a surgeon's encyclopedia, is it, Dr. Thompson, and if not, what is it?

A. Yes. Articles on each branch of surgery are contributed by men who are considered outstanding in that particular branch, and the system is kept up-to-date by having the articles revised as new developments occur in that particular branch.

Q. Are you familiar with Christopher's Textbook of Surgery? A. I am.

Q. Has Dr. Donovan made contributions to that publication? A. I believe he has.

Q. And what use is Christopher's Textbook put to?

A. As a reference book for men practicing medicine, and [74] as a teaching textbook.

(Testimony of Dr. Hugh Thompson.)

Q. Now, Dr. Thompson, from the knowledge gained by you in your practice of pediatrics, from the knowledge you have gained from attending these sundry meetings of pediatric associations or organizations, based on that and such other knowledge as you may have on the subject, who, in your opinion, is the most eminent pediatric surgeon in this country?

Mr. Robertson: I object to that because it has been answered just four times, and, if necessary, I shall stipulate that Dr. Thompson thinks that Dr. Donovan is the most eminent pediatric surgeon in this country.

Mr. Allen: I am very much surprised at the divining powers Counsel has displayed, but incidentally I don't think Dr. Thompson regards Dr. Donovan as the most outstanding pediatric surgeon in the United States.

Mr. Robertson: I think it would save time if I would so stipulate and I am willing to do it.

Mr. Allen: Very well. I was going to introduce in evidence that Dr. Ladd of Boston is.

Mr. Robertson: He is pretty good, too, but I will stipulate that Dr. [75] Donovan is the best.

Mr. Allen:

Q. Having so stipulated, we will depart from the examination on that subject. In the course of your practice of medicine in the State of New York, have you, and if you have, to what extent, have you become aware of and acquainted with the practice and

(Testimony of Dr. Hugh Thompson.)

custom in and about New York City on the part of eminent surgeons who give specialized attention in some particular field of surgery, as to the amount of fees which they charge for the performing of operations within such specialized field?

Mr. Robertson: I object to the question, because the custom or any circumstances or conditions existing in the state of New York is entirely immaterial in the trial of this case, because the services were performed in the city of Tucson, and I can cite authorities to the court if there is any doubt.

Mr. Allen: I can cite a few myself, your Honor.

The Court: The principle the counsel has announced, I find is the principle announced in *Corpus Juris*. [76]

The Court: I overrule the objection.

Mr. Allen: Will you please read the question?

The Reporter: (Reading)

Q. In the course of your practice of medicine in the State of New York, have you, and if you have, to what extent, have you become aware of and acquainted with the practice and custom in and about New York City on the part of eminent surgeons who give specialized attention in some particular field of surgery, as to the amount of fees which they charge for the performing of operations within such specialized field?

Mr. Robertson: I have another objection. The first part of the question is "Have you become acquainted" and the second part is "To what extent". I object to the multiplicity of that.

(Testimony of Dr. Hugh Thompson.)

Mr. Allen:

Q. I can split it up. Have you, doctor?

A. I believe so, yes.

Q. To what extent, doctor?

A. To the extent that I know of the usual fees charged by perhaps eight or ten surgeons who specialize in a branch of surgery for certain operations which they perform. [77]

Q. Now, Dr. Thompson, based upon your knowledge concerning the schooling and general training, specialized training and experience, of Dr. Donovan, based upon your knowledge of his standing and of his eminence as a specialized pediatric surgeon, or as a surgeon giving specialized attention to the surgery of infants, based upon your knowledge of and participation in the employment negotiations through which Dr. Donovan was employed and under which he did operate on the Jeffcott baby; based upon your observation of and knowledge concerning the condition of the Jeffcott baby before the operation; based further upon your observation and knowledge of and concerning the operation and your participation therein; based further upon your observation and knowledge as to the condition of the Jeffcott baby throughout the post-operative period of several months following the operation; and based further upon your knowledge of the practice and custom of specialized surgeons in and about the city of New York, what, in your opinion, would constitute a reasonable charge to be made by Dr.

(Testimony of Dr. Hugh Thompson.)

Donovan for the performance of the operation which he performed in your presence upon the Jeffcott baby?

Mr. Robertson: The principal objection I have is that the hypothetical question contains no facts showing the financial condition of the defendants in this case, and my other objection is that the customs in New York have nothing to do [78] with it. There is nothing contained in the hypothetical question as to the financial condition of the parties and Dr. Thompson has not stated in what way the financial condition of the parties to pay the bill is to be considered by the eminent surgeon who is making the charge, and that was the principal error in the famous case of Citron vs. Fields, where the testimony of the society doctor was thrown out.

(Argument.)

The Court: I overrule the objection.

Mr. Allen:

Q. Do you desire the question read?

The Court: The last question would be what would be the reasonable value of such services.

The Witness:

A. May I answer in more than two or three words? I would like to say that in view of the type of operation, the age of the patient, the skill and eminence of the surgeon and the outcome of the operation, I feel that the surgeon is justified in charging as high a fee as any surgeon would charge for any operation, and from what I understand to be

(Testimony of Dr. Hugh Thompson.)

the maximum charges made by physicians of [79] similar eminence, I would say that fee would be in excess of ten thousand dollars, and that does not take into account any ability of the patient to pay.

Mr. Robertson: I move to strike the answer for the reason that it is not responsive. The answer clearly demonstrates that the opinion is based on only certain portions of the evidence in the case, and entirely ignores the evidence as to the ability to pay, and for the reason that in a part of the answer he states that he thinks that this particular surgeon should be entitled to charge a fee equal to the highest fee that has been charged by another surgeon, which is wholly ridiculous and preposterous, without any regard whatsoever for the ability of the patient to pay, the amount of time devoted to the operation, and other circumstances which a court is bound to consider.

The Court: The motion will be denied.

Mr. Allen: Take the witness.

Cross Examination

By Mr. Robertson:

Q. In other words, Doctor, it is your belief that Dr. Donovan in this case would be justified in charging [80] a fee which is equal to the highest fee any surgeon has ever charged?

A. Reasonable fee, Mr. Robertson.

Q. And what enters into your determination of what is a reasonable fee?

(Testimony of Dr. Hugh Thompson.)

A. If you leave out the ability of the people to pay?

Q. I say, what enters into your determination of what is a reasonable fee?

A. A reasonable fee is based on the service performed, the skill and eminence of the surgeon, and the ability of the people to pay.

Q. That is correct. You also know that even in New York, the ability to pay is a test of the charge, of the amount that the surgeons charge?

A. Not necessarily.

Q. But as a general practice?

A. No, I beg to differ with you. And I know this, and I can give a good many instances of surgeons or physicians who are busy who do one of two things, in general. They see poor patients in the hospital clinics for nothing, and do a great deal of it. When people come to their offices or request an operation or a delivery or something of that sort, they frequently have a set fee for that particular thing. If the patient says "I cannot pay that", they will say, "All right, go to Dr. Jones around the corner. He is good and he will do it for less than I will do it". That is their practice. If [81] you say you cannot pay, they will say, "All right. I am sorry".

Q. You are acquainted, either personally or by knowledge of standing, with Dr. William A. Downes, are you not?

A. Yes, sir.

Q. You consider him to be one of the leading and most eminent surgeons in New York?

(Testimony of Dr. Hugh Thompson.)

A. I believe he is.

Q. Do you also know, either personally, or by knowledge of his standing, Dr. Carl G. Burdick?

A. I do.

Q. And do you likewise know Dr. Fenwick Beekman?

A. I know who he is.

Q. Would you say they represent the higher, more eminent physicians in New York?

A. They do.

Q. Would you say that the yardstick of measurement of a fee of those men is representative of that class of people in New York?

A. Yes. Now, I don't know what they charge. I have no personal knowledge of any fees ever charged by those men.

Q. But would you say that their practice and their system and the way they go about charging a fee is fairly representative of eminent physicians and surgeons in New York?

A. I do not know. There are surgeons who are eminent in [82] their profession who have entirely different ways of charging.

Q. What are some of the ways of charging a fee? What do they take into consideration in addition to the ability of the patient to pay?

A. They frequently do not take into consideration at all the ability of the patient to pay, Mr. Robertson. Sometimes they do and sometimes they do not.

Q. That is in cases where the fee is fixed in advance?

A. No.

(Testimony of Dr. Hugh Thompson.)

Q. Do you know any specific cases in which that was done? A. Yes.

Q. Will you please name the doctor and patient and the type of operation?

A. I am not able to do that.

Q. Can you give one illustration?

A. That would not be permitted. I cannot name the operation done on any patient by any physician. I think you will find that is in accordance with medical ethics.

Q. Now, Doctor, let us be fair about this. I know your interest is not personal in this case. Is it not a fact that the most eminent surgeons, Doctors Downes and Beekman and Burdick being in that class, take into consideration the ability of the patient to pay in determining the amount of a fee?

A. I think they do if a patient tells them ahead of time they cannot pay much. [83]

Q. Is that the only circumstance under which they ever do?

A. I think it is safe to assume that if the patient gives no appearance of being unable to pay, that when the doctor sends out his bill, he sends it for whatever he considers to be his fee for that particular service.

Q. You figure then that if he charges any fee he wants as a general practice, that that should be the yardstick of the reasonableness of that fee?

A. Will you repeat that question?

The Reporter: (Reading)

(Testimony of Dr. Hugh Thompson.)

Q. You figure then that if he charges any fee he wants as a general practice, that that should be the yardstick of the reasonableness of that fee?

A. No, not necessarily.

Mr Robertson:

Q. All right. What is it?

A. That is a very hard thing to answer, for this reason: I know of a surgeon in New York who has a reputation for performing a certain operation in which he is particularly skilled, asking a fee of twenty-five thousand dollars. Now, that fee is not reasonable for a man making a hundred dollars a week.

Q. That is right.

A. We know that. Most people making a hundred dollars a week don't go to that surgeon. They know ahead of time his reputation. They know a little bit about it. It [84] is the same thing as going in and ordering an automobile. You surely know you are not going to pay for a Chevrolet if a Packard is sent around to you.

Q. Yes.

A. It is partly based on your eminence. Your ability to do any particular thing in medicine is based on a great many factors. That patient is paying not for two days' services.

Q. That is true.

A. They are paying for years of experience, the fact that that doctor has worked for eight or ten years for nothing; that he has unusually dex-

(Testimony of Dr. Hugh Thompson.)

terous hands; that he has unusually good or unusually bad judgment, as the case may be. They are paying for his reputation. The fact that he is the outstanding man in that field gives them a certain feeling of security, the knowledge that he has done a certain number of operations with a minimum of mortality; in other words, instead of five out of twenty having died, when he has operated, only four out of twenty have died, and you pay for that.

Q. That is interesting, but is it not a fact that you and the doctors in New York, in making a charge where no previous fee has been agreed upon, that you take into consideration the ability of the patient to pay—and I submit that question may be answered “yes” or “no”.

A. If there is no great evidence of poverty, no.

Mr. Robertson: I move that answer be stricken and ask that he answer [85] “yes” or “no”.

A. Yes, if I know it. In other words, if I know the ability of the patient to pay.

Q. Then suppose, Doctor, that a charge is made and subsequently you find out that your preconceived idea of the patient's ability to pay is in error, is your first judgment absolutely binding forever? A. No.

Q. Then you would take into consideration the ability of the patient to pay?

A. I would.

Q. Would you say that testimony by Dr. Downes and Dr. Burdick and Dr. Beekman as to the gen-

(Testimony of Dr. Hugh Thompson.)

erally prevailing practice in New York would be apt to be more accurate than your own testimony as to the custom of charging fees?

A. Yes, I imagine so.

Q. They have been there longer and are more acquainted with how things are carried on?

A. Yes, I believe that.

Q. And the opinion you gave as to the reasonable fee in this particular instance took into consideration, or did not take into consideration, the financial circumstances of Mr. and Mrs. Jeffcott?

A. That is quite correct.

Q. When you communicated with Dr. Donovan on the telephone and told him that money was no object, you did not tell him that he could charge anything he wanted to, did you? [86]

A. No, I did not.

Q. You simply told him that money was no object?

A. Yes.

Q. So that the fee that Dr. Donovan may charge in this case should be based upon a consideration of all of the elements that go into the determination of whether a fee is reasonable. Isn't that true?

A. Yes, it is.

Q. In other words, it would not be your testimony, would it, that had Dr. Donovan sent in a bill for fifty thousand dollars, that that would constitute a reasonable fee?

A. I do not know, sir. I am not conversant with it.

(Testimony of Dr. Hugh Thompson.)

Q. You do not know whether a fee of twelve thousand five hundred dollars would be reasonable?

A. Leaving out the unknown factor that I am not competent to pass on, that would be a reasonable fee.

Q. And that unknown factor is the ability of the patient to pay? A. Correct.

Q. Now, Doctor, in connection with the repertoire of nurses and the fancy quarters that Mrs. Jeffcott and the baby were occupying, the quarters were the standard quarters for patients brought out there by Dr. Carrell?

A. No, not necessarily. There are different priced rooms.

Q. This was perhaps one of the more comfortable rooms? A. Yes. [87]

Q. Do you know what that room cost per day? A. No, I don't.

Q. There was not a very wide variance?

A. I think the rooms varied at that time from six to twelve dollars per day, if I am not mistaken.

Q. Is it not a fact that St. Mary's Hospital and the Desert Sanatorium make a flat rate for rooms for maternity patients, who come there?

A. Yes, I think they do. I believe that is correct.

Q. And that rate is somewhat lower than the standard per diem rate would be?

A. Yes, I believe it is. I am not absolutely certain. In fact, I rather think, Mr. Robertson, that that

(Testimony of Dr. Hugh Thompson.)

was not in effect at the time Mrs. Jeffcott was there. If it was in effect at that time, it was a special arrangement, because as I recall we did not open the nursery for about a year after that, or several months, in any event, and I believe it was then that the flat rate went into effect. I had nothing to do with the financial arrangements at the San.

Q. In any event, the nurses were there at your order, were they not?

A. I believe we felt it would be advisable, yes, to have a special nurse.

Q. In other words, you were in charge of this case as a pediatrician, were you not?

A. Whenever you suggest putting a nurse on a case, you [88] assume the ability of the patient to pay. If the patient says, "I cannot afford a private nurse", usually they get along without a private nurse. In other words, you make one of the regular nurses do double duty. For instance, if I send a child out to St. Mary's and say "We are going to put a special on with the baby" and they say "All right", she goes on, and if they can they cannot afford it, I try to make other arrangements.

Q. You suggested that this nurse be put on to take care of the baby?

A. I don't remember, but I believe I did.

Q. The care of this nurse was necessary for the proper attention to be given to that child?

A. Somebody should be with the child, yes.

(Testimony of Dr. Hugh Thompson.)

Q. And Mrs. Jeffcott was in no condition to do it herself? A. No, of course not.

Q. And Mr. Jeffcott would not make a very good nurse, would he? A. I don't know.

Q. So the care given the baby out there was not unreasonable, lavish or extraordinary, the care at the Sanatorium?

A. No, I don't believe so.

Q. When you had that conversation with Mr. Jeffcott—By the way, do you remember, when you asked him about money, is it not true that he said “No, anything within reason”?

A. I am quite sure he did not, Mr. Robertson. I am quite [89] sure his answer was one word.

Q. And that word was “No”?

A. Yes, that is right.

Q. And you did not know what he had in his mind as to what the fee might be?

A. No, sir, I did not.

Mr. Robertson: That is all.

Mr. Allen: I think, your Honor, that we will release this witness at this time, and would like the court to admonish the witness to the effect of the rule, and would like the indulgence of the counsel to release him from the presence of the court, because of his profession.

The Court: Are you going to require this witness to testify further?

Mr. Allen: I don't know. He may be desirable as a rebuttal witness.

(Testimony of Dr. Hugh Thompson.)

The Court: The rule has been invoked, Doctor. Except for here in court testifying or conferring with attorneys, do not talk about the case with others. Until released, you are, of course, under the rule. [90]

EDWARD J. DONOVAN

plaintiff herein, called as a witness in his own behalf, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Allen:

Q. Will you bear in mind, Doctor, in the course of your testimony, as I shall attempt to do as counsel, that a lot of street noises intrude here, and endeavor to speak accordingly, so that you can be heard over and above the traffic.

Q. Your name is Edward J. Donovan?

A. Yes, sir.

Q. Where do you reside, Dr. Donovan?

A. Inglewood, New Jersey.

The Court:

Q. What did you say, doctor?

A. Inglewood, New Jersey.

Mr. Allen:

Q. What is your profession or occupation, Dr. Donovan? A. Surgeon.

(Testimony of Edward J. Donovan.)

Q. Where do you practice, doctor?

A. I practice in New York City.

Q. Where are your offices located?

A. 862 Park Avenue, now. [91]

Q. Where were they located on or about April, 1939?

A. 424 Park Avenue.

Q. In the City of New York?

A. Yes.

Q. Omitting any pre-college schooling you may have had, will you outline for the benefit of the court the extent of your training in schools for your profession?

A. Beginning with college?

Q. Yes.

A. I took the degree of Bachelor of Science from Hobart College in 1917, and graduated from the College of Physicians and Surgeons, which is the medical college of Columbia University, in New York City, in 1920.

Q. Did you have any further college training?

A. No further college training, no.

Q. I will ask you to state, doctor, whether or not, in connection with either or both of those degrees, you were graduated with any honors or were admitted into any honorary societies.

A. I graduated with *cum lauda*, Pi Beta Kappa, and with honors from medical college, Alpha Omega Alpha, which is the same for medical college that Pi Beta Kappa is in college.

Q. Did you say what degree you received from Columbia? The degree of M. D., did you say?

A. Yes, sir.

(Testimony of Edward J. Donovan.)

Q. Following that degree, or on receipt of said degree, what [92] further professional training did you have, doctor?

A. I had six months training in the Mary McLellan Hospital, Cambridge, New York; two years in St. Luke's Hospital, New York; four months training as resident in Lying-In Hospital in New York.

Q. Now, Dr. Donovan, when and where were you admitted to practice your profession?

A. I was admitted to practice in New York, about June 1, 1921.

Q. And where have you carried on the practice of your profession since such admission?

A. Entirely in New York City.

Q. Entirely in New York City?

A. Yes, sir.

Q. I will ask you to state, Dr. Donovan, what connection you have had with, or what positions you have held in hospitals as a surgeon other than your internship which you mentioned?

A. I received an appointment as assistant tending physician at St. Luke's—that is the lowest—where you start—and one year after I finished my internship there, during the year following the completion of my internship, I was made attending physician at the Babies' Hospital during that same year—that is, within one year after I completed my internship.

Q. What were your duties, Dr. Donovan, in your

(Testimony of Edward J. Donovan.)

capacity of assisting attending physician at those hospitals?

A. I did all of the emergency work, practically, at the [93] Babies Hospital, and did the emergency work at St. Luke's Hospital, four nights a week. I was on call four nights a week.

Q. Did such emergency work include the surgery at those hospitals?

A. That was all surgery.

Q. What further connections did you thereafter have in hospitals in the course of your practice, Dr. Donovan?

A. I was appointed consulting surgeon in three different hospitals in or about 1930. That was Yonkers General Hospital, at Yonkers, New York; Fitkin Memorial Hospital at Neptune, New Jersey, and North Westchester Hospital, which is in Mt. Kisco, New York.

Q. What were your duties in connection with those appointments? A. As consultant.

Q. Now, Dr. Donovan, how long did your connection with St. Luke's and Babies Hospitals continue?

A. I am still at both of them.

Q. Through what ranks or through what employments have you progressed, and what rank or employment do you hold now in such hospitals?

A. About 1926, I was promoted to associate attending physician, which is the next rank above the one I have previously mentioned, at St. Luke's, and

(Testimony of Edward J. Donovan.)

at the Babies Hospital, and about 1930, I was again promoted to attending surgeon in each of those hospitals, which is the highest rank, as you are in charge of surgery when you [94] are attending surgeon. About 1926, I was elected to the American College of Surgeons.

Q. When were you made Chief Surgeon in the Babies' Hospital? A. About 1930.

Q. And St. Luke's?

A. About the same time. About 1931 or perhaps 1932, I was elected to the New York Surgical Society. About 1936 I was elected to the American Surgical Society. About 1938, when the American Board of Surgery was started, I was taken in as a charter member of the American Board of Surgery, and I have since, on several occasions, examined applicants for the American Board of Surgery.

Q. Now, Dr. Donovan, are there——

A. There is one more.

Q. Pardon me for interrupting.

A. I forgot one I meant to mention. About 1926 I was appointed assistant professor of surgery at the American College of Surgery at Columbia University.

Q. As to which of these organizations, if any, is membership dependent upon accomplishment or eminence?

A. The American College of Surgeons, you are not allowed to join—that is the way it was then—you are not allowed to join until you have been out

(Testimony of Edward J. Donovan.)

of college seven years, and then you have to report in writing, detailed report, of at least fifty cases, and summarize fifty other cases. In the New York Surgical Society, you *are elected* to the New York Surgical Society until [95] you have a rank such as associate attending surgeon, which is the middle one I have mentioned, in an accredited hospital in New York, and your election there depends to a large extent upon how many cases you have presented to the surgical section of the New York Academy of Medicine, which is an entirely different thing, or how many papers you have written. A great deal of stress is laid on how many cases you have presented to the American Academy of Medicine. The American Surgical Association includes, or has only one hundred and seventy-five members over the United States and Canada. and is without question the most exclusive and best surgical association in existence. Your election to that society depends entirely upon your ability, that is, they will not take a man there—it is very difficult to get in, is what I mean to say. They will not take a man there unless he has done a great deal of work of the proper kind, that is, a great deal of good surgery. In the American Board of Surgery, I was taken in as a charter member, and it means nothing more than that I was an attending surgeon at a hospital. It takes nothing more to get into that. I believe that is all. My position as assistant attending surgeon, I believe I have described. My being assistant pro-

(Testimony of Edward J. Donovan.)

fessor of surgery at Columbia means I have teaching to do throughout the year, and I will elaborate on that teaching, if you want me to do so. [96]

Q. You might briefly explain to the court what you teach.

A. I teach surgery of children. That teaching consists roughly of something like this: It is two kinds of work. One is to take a group—we have only the third and fourth year students to teach, because this kind of surgery is not taught previous to that time. The teaching consists in taking a group of from ten to twenty students on the ward, on the surgical ward, and having them present to me usually three or four cases that they have worked on and prepared. They present them to me. That is the so-called ward teaching. That is divided up among the members of the surgical staff so that each particular surgical man on the staff at the Babies' Hospital has to do that perhaps four times a year. There are probably twenty to twenty-four sections like that. Then there is a lecture in which you have the entire class, either the third or fourth year class, which consists of about one hundred members, roughly, where you present to them cases from your surgical service; that is probably ten cases I have picked at random I present to them and give a talk on each different type of case. They are supposed to be cases just as they come in surgical work, representing surgery in children or infants.

(Testimony of Edward J. Donovan.)

Q. Have you been called upon to write any scientific articles of surgical interest?

A. Yes, sir. [97]

Q. Will you state what articles you have written on that subject and where they have been published.

A. I have written a chapter in the Lewis Practice of Surgery, which has been referred to above. I have written a chapter in Christopher's Textbook of Surgery. Then I have been asked to write——

Q. Have you written anything for Nelson's Loose-leaf——

A. Excuse me, I meant to say Nelson's.

Q. At whose instance were those prepared?

A. Dr. Christopher, who is the man who gets out Christopher's Surgery, and by W. T. Pryor, who gets out Nelson's Surgery, at Hagerstown.

Q. What is the use and prominence of Christopher's Textbook?

A. I think it is considered one of the best single volume textbooks or surgery, and is used for reference, and I think it is used in a good many medical colleges.

Q. What is the use and prominence of Nelson's Loose-leaf Surgery?

A. That is loose-leaf and consists of a good many volumes and the advantage of that is that it is kept up-to-date by re-writing chapters, and being loose-leaf, the old chapter can be taken out and the new chapter put in, if something new has developed in

(Testimony of Edward J. Donovan.)

that particular chapter. That is a very high-class reference, a sort of encyclopedia of surgery. It covers everything.

Q. Now, Dr. Donovan, I ask you to state whether or not you have had occasion to appear before meetings of any of [98] the medical or surgical organizations of the nation as a speaker on surgery, and if so where and when, and upon what subjects?

A. I have been asked to speak a good many times, and that is not awfully unusual. That is, this group in Newark, New Jersey, or in town, or someplace, Connecticut, any place within a radius of thirty miles or so from New York—it is a very common occurrence to be asked to speak on a certain subject. I cannot tell you how many times I have done that.

Q. Have you appeared at any time before the American College of Surgeons? A. Yes, sir.

Q. When was that?

A. Well, at the regular meeting, which I think was two years ago.

Q. What participation, what part did you take in that meeting?

A. I took part in a panel discussion.

Q. On what subject?

A. Intestinal obstruction in infants. I also took part in a panel discussion at the American Academy of Pediatrics in Boston last year.

Q. Dr. Donovan, for how long a time was your

(Testimony of Edward J. Donovan.)

surgical experience and practice limited to the work done in St. Luke's Hospital and the Babies' Hospital?

A. Well, almost entirely. You see, once I got my appointments in each of those hospitals, I started to work. [99] It was sometime within the first year after I finished my internship.

Q. When did you commence private practice of surgery? A. In 1923.

Q. And have you, during any of the period of your professional activity, limited your practice exclusively to surgery? A. Yes, sir.

Q. Dr. Donovan, what particular training, if any, did you have, and under what surgeon or surgeons, which would tend to give you specialized training and experience and qualification in the performance of abdominal surgery in infancy?

A. I have been trained under and very closely associated with Dr. Downes, who was perhaps the first man in this country to make an attempt to separate the surgery of infancy from general surgery. He was then head surgeon of the Babies' Hospital.

Q. How long did you have that association with him?

A. From 1921 until about—Dr. Downes stopped active practice about—let me see—about 1927 or 1928.

Q. What was the nature of your association with him?

(Testimony of Edward J. Donovan.)

A. I was trained by Dr. Downes, that is, I had my internship under Dr. Downes. He was my chief surgeon. It was while I took my surgeon internship. I took my orders from Dr. Downes. I was his interne.

Q. Are you interested in the specialized field of abdominal [100] surgery in infancy?

A. Yes, sir.

Q. How long have you been so interested in that field of specialized surgery, doctor?

A. Well, really since 1923, or the year after I started to practice, the year after I finished my internship.

Q. How long have you been giving specialized attention to surgery of infants?

A. Since that time.

Q. How long have you been performing abdominal operations upon infants in substantial numbers?

A. Since 1923.

Q. Dr. Donovan, how long have you followed the course of devoting your professional attention exclusively to surgery?

A. Twelve years. Did you mean in the last question you are speaking of time I have been on my own, outside the internship?

A. Yes. Did you, while interning under Dr. Downes, at Babies' Hospital, have occasion to perform, or to assist in performing abdominal surgery?

A. I did not interne under Dr. Downes at Babies' Hospital, but I interned under Dr. Downes

(Testimony of Edward J. Donovan.)

at St. Luke's, and then worked under Dr. Downes at Babies' Hospital, that is, he was my boss, because he was in charge of surgery. My internship at St. Lukes was taken directly under Dr. Downes. [101]

Q. Now, Dr. Donovan, how many operations have you performed in approximation for the correction of intestinal obstruction?

A. I have not quite finished the last question. You asked about the training. Do you want me to go on with that?

Q. Pardon me.

A. Following Dr. Downes, Dr. Boling, who had previously worked under Dr. Downes, was appointed attending surgeon at the Babies Hospital, and also attending surgeon at St. Luke's Hospital, and I worked then under Dr. Boling, who wrote a textbook on surgery of infants and childhood somewhere along about that time. I worked under Dr. Boling then until about 1928. Dr. Boling died about that time. I do not know exactly the date but it was somewhere along in there. I think that is the training.

That completes your training in surgery in infants? A. Yes, sir.

Q. Could you state to the court approximately the number of operations you have performed upon infants in the course of your surgical practice, for the correction of intestinal obstructions?

A. May I ask you a question about that? Do you mean like we are considering here?

(Testimony of Edward J. Donovan.)

The Court: A little louder, doctor.

A. I want to ask if he means like we are talking about here. [102]

Mr. Allen:

Q. How many operations have you permormed for malrotation? A. Eighteen.

Q. How many surgical operations have you performed in general involving obstruction?

A. A good many. I could not tell you the number, sir.

Q. How many cases have you reported to the American College of Surgeons involving pyloric stenosis?

A. I have operated on more than five hundred cases of pyloric stenosis, and have reported three hundred and fifty of them in the literature.

Q. What was the mortality occurrence in those five hundred cases?

A. I reported one death in the first one hundred cases, and have had no deaths since, so the mortality at the present time is one death in five hundred and some odd cases.

Q. What is the surgical operation for pyloric stenosis?

A. It is the closing of the lower end of the stomach of a baby because of the overgrowth of one muscle, the circular muscle. The reason you have to operate on this baby is that he begins to vomit. Ninety per cent of them begin to vomit between the second and fifth week of life. Occasionally they

(Testimony of Edward J. Donovan.)

start to vomit a little before that or after that. The operation is to open the passage at the lower end of the stomach, an abdominal operation.

Q. Throughout all of your surgery, is there any particular [103] field of surgery in which you have specialized?

A. A great part of my surgery is abdominal surgery. Is that what you mean?

Q. Yes, if that happens to be your specialized field.

A. I have done more abdominal surgery than chest surgery. I have done some chest surgery, too.

Q. What is the relation of the volume of surgery done by you as to adult cases and infant cases?

A. I do a good deal of adult surgery. I do as much adult surgery as I do child surgery. I think it would be fifty-fifty.

Thereupon the court recessed until January 30, 1942, at the hour of ten o'clock in the forenoon, at which time the trial was resumed, with the same appearances as heretofore noted.

EDWARD J. DONOVAN

resumed the stand and was further questioned under direct examination.

Q. Dr. Donovan, I believe that at the afternoon recess yesterday, you had stated that you had also, in addition to performing in excess of five hundred

(Testimony of Edward J. Donovan.)

pyloric stenosis operations, performed some chest operations in a substantial number. What was the nature of those operations? [104]

A. —hernia, or what is commonly known as upside down stomach.

Q. Is that an abdominal operation?

A. It may be either an abdominal or a chest operation. I do them through the abdomen. Other men do them through the chest.

Q. How many of those operations have you performed?

A. I performed fifteen. I reported twenty, thirteen of which I had operated upon. I have since done five. I have operated about eighteen.

Q. Now, Dr. Donovan, how many operations have you performed for complete obstruction similar to the operation in issue here?

A. Eighteen.

Q. And what other operations have you performed in substantial number?

A. Well, I am sure I have removed over two thousand appendices. I have done hundreds of hernias. I have done a great number of stomach operations for cancer and ulcer. I have done a great many operations for cancer of the large intestine and rectum. In St. Luke's in the last two years, I was given that particular branch of surgery to do, to take charge of. I have done a good many goiter operations. In other words, I cannot think of any ordinary abdominal operation I have not

(Testimony of Edward J. Donovan.)

done in considerable numbers, and I can think of several unusual operations that I have done in the abdomen.

Q. Now, Dr. Donovan, explain to the court the frequency [105] of the occurrence of the jejunal obstruction you found in the Jeffcott baby.

A. Well, the twenty cases I reported with Dr. McIntosh, eighteen of which had been operated upon—fourteen of these I had operated upon.

Q. When did you make such report with Dr. McIntosh approximately?

A. 1939. Those twenty cases go over the same period of time that the five hundred cases of pyloric stenosis go over, and since I was here, in a period of three years, I have operated upon four others.

Q. Now, Dr. Donovan, do you know of any pediatric surgeon in the United States who performs a greater number of that operation than you have?

A. The only way I have of determining that is by reports in the literature. That is the only way I can tell that.

Q. What are the indications?

A. There is no larger number reported in the literature that I have seen, or that Dr. McIntosh has seen.

Q. Handing you this printed document, I ask you to state what that is?

A. This is a reprint of our article, Dr. McIntosh's and mine, called "Disturbances of Rotation of the Intestinal Tract", published in the American

(Testimony of Edward J. Donovan.)

Journal of Diseases of Children by Dr. McIntosh and myself. Dr. McIntosh is professor of pediatrics at Columbia University. These were all disturbances in rotation of the intestinal tract. [106] Fourteen of these were operated by me.

Q. Does that article indicate the ones operated upon by you?

A. No, sir. I think it does mention the name of one man who operated upon one case.

Mr. Allen: I offer this in evidence as Plaintiff's Exhibit 6.

Mr. Robertson: No objection.

Reprint marked as Plaintiff's Exhibit 6 in evidence.

Mr. Allen:

Q. Dr. Donovan, what, or which, of these abdominal operations in infancy are the more serious, more delicate, from the standpoint of the probable success of the operation and the probability of recovery of the patient?

A. Any complete obstruction is as dangerous a thing as you can have.

Q. In other words, you regard that no abdominal condition could be materially more serious than that which was presented in this case?

A. Yes, sir.

Q. What factors, Dr. Donovan, bear upon the relative seriousness within that group of cases?

A. In that group of cases, there is a mortality of six, [107] that is, six in eighteen that were operated on died.

(Testimony of Edward J. Donovan.)

Q. What caused that high mortality?

A. Well, one of those patients died from shock. It undoubtedly was too much of an operation. Two of them died from peritonitis where the intestine had perforated, and three of the four I have operated upon since I was here, have died from the same reason. The intestine was perforated at the point of volvulus. One of those babies was operated upon before it was twenty-four hours old. Another baby was operated upon before it was thirty hours old. The intestine was already gangrenous.

Q. You say at the point of volvulus?

A. At the point of obstruction.

Q. What effect does the age of the infant have upon the seriousness of the operation?

A. A serious abdominal operation upon a young baby is quite a thing for that baby to go through.

Q. What effect does the age have upon the difficulty of the mechanical performance of the operation?

A. It does not have a great deal, if you are used to operating on babies. What does happen, you can operate upon any baby if its fluid has been restored—You can operate upon the baby up to a certain point and he resists very well, but when this baby begins to go bad, he goes bad very quickly. He will resist what you are doing to him up to a certain point very well, but after that point is passed, he will go down very rapidly. [108]

Q. How does the difficulty of performance and gravity of the surgical situation compare between

(Testimony of Edward J. Donovan.)

a serious condition on the part of an infant and a relative like serious condition on the part of an adult in an abdominal operation?

A. I think the same condition in an infant is much more serious. You cannot expect a baby four or five days old to withstand an operation that takes an hour or an hour and a half, when an adult will do it very well. The younger the patient, certainly the graver the risk.

Q. Now, Dr. Donovan, when were you first approached with reference to employment on the Jeffcott case?

A. On the first day of April, about—and I differ a little bit about the time than what was stated by witnesses previously, and I have several reasons for doing that.

Q. State what time you were first approached in that regard.

A. About half past ten, eastern standard time, or perhaps eleven o'clock, I received a telephone call at Atlantic City from Dr. Thompson of Tucson.

Q. What was the conversation with reference to your employment?

Mr. Robertson:

Q. What day was that, if I may ask?

A. It was April 1st, the day before I came here.

Q. It was Saturday?

A. Yes, it was Saturday. That conversation consisted in Dr. Thompson telling me he had a baby eight days old, who had complete intestinal obstruc-

(Testimony of Edward J. Donovan.)

tion, and asked me if I would meet him, tomorrow, Sunday, at the Babies [109] Hospital and see the baby and operate upon him if it was necessary.

Mr. Allen:

Q. What was said by you in reply to that request? A. I said I would do it.

Q. Was anything further said at that time as a part of those negotiations? A. No, sir.

Q. When did you next have any negotiations with reference to the Jeffcott case?

A. I think that the time of the second call was less than an hour later, and I will tell you the reason I think that. I was paged and went to a certain telephone booth for the first call, and I had not yet left the immediate vicinity of that telephone booth. I took the second call at the same telephone booth, and all I had done was to talk to Mrs. Donovan about changing our plans. I was in Atlantic City and had been there less than twelve hours. I talked with her about changing our plans, that I would have to go back to New York, to be there at ten o'clock the next morning.

Q. What took place at that time?

A. I was called again by Dr. Thompson from Tucson, stating that the parents wished me to come out here, rather than bring the baby to New York.

Q. What further was said by either of you in that respect? [110]

A. He told me I would have to fly. He told me what airline I should take and what time the plane left.

(Testimony of Edward J. Donovan.)

Q. From where was that plane due to depart?

A. Newark.

Q. What further conversation was had with reference to your employment or your trip?

A. I hesitated a little bit.

Q. Did you make that hesitation known to Dr. Thompson?

A. I think it was very obvious. I don't know that I said "I am going to think about this a moment". I was a little bit surprised by it. I had never flown before and it took me a few moments to think about it. I asked Mrs. Donovan if she had any objections to my flying, and then I told Dr. Thompson that I would come.

Q. Was anything further said at that time about the employment?

A. It was said previous to my decision to come.

Q. What, if anything, further was said?

A. That expense was of no consideration, or words to that effect.

Q. And you consented to make the trip?

A. Yes, sir.

Q. Now, how long thereafter did you have to prepare to depart on that trip? What did you do in that respect?

A. That is why I felt so sure about the difference in time. The first thing I did after that was to see if I could get reservations on that particular plane, from the desk in the hotel, and I think Mrs. Donovan did that for me, [111] and I do not know whether

(Testimony of Edward J. Donovan.)

they had to call Newark or not, but they determined that. I know I did not make the reservation. Either the man there made it or Mrs. Donovan made it. I had, as I remember, twenty or thirty minutes to get the train in Atlantic City to get me into Newark to catch the six-ten plane. I did not have time to pack thoroughly, and I forgot a great many things, which I had to buy in Newark.

Q. What effect, Dr. Donovan, did that need for immediate departure have upon your practice situation in New York?

A. I did not have time to call New York and arrange to have my patients taken care of.

Q. What was done in that respect?

A. Mrs. Donovan did it.

Q. When did you depart from Newark?

A. At six-ten.

Q. When did you arrive in Tucson?

A. At half past six, your time, next morning.

Q. What took place upon your arrival, Dr. Donovan?

A. I was met at the air field by Dr. Thompson. We went directly to the Desert Sanatorium, and I think we met Dr. Carrell there, and at any rate we examined the baby's x-rays, with Dr. Carrell, and then we examined the baby and determined an operation was necessary.

Q. Then what took place?

A. Dr. Carrell then asked me what I wanted to use in regard to instruments, and he arranged—

(Testimony of Edward J. Donovan.)

I gave him a list of [112] the things I would like to have, and he said they might not have them, and he took the trouble of going to some other hospital to get them—I think it was St. Mary's, but I am not sure about that name. I do not know whether I had breakfast there or not, but I went to church while he was getting the instruments, and then he picked me up again, either on his way back, or made a special trip to get me—I do not know which—and we took a little ride around, a very short one, because I had set the time of operation at the Desert Sanatorium for half past ten. He showed me a little of the scenery and we went back to the Desert Sanatorium together before the time set for operating on the baby.

Q. Then what took place?

A. We operated upon the baby.

Q. Just at that point, Dr. Donovan, what pathology or condition did you find with reference to this infant?

A. All that you can do in a case like this, or all we felt sure could be done at that time—I have a few more ideas now—you can make a diagnosis of complete obstruction, but you cannot say it is volvulus or what it is. You can say, "The baby has a complete obstruction".

Q. What does that mean?

A. It means he must have an operation. The reason I say that is that there are certain things that determine complete intestinal obstruction and this

(Testimony of Edward J. Donovan.)

baby had all of them, and I shall enumerate them if you want me to. [113]

Q. What condition did you find after making the incision and getting into the abdomen?

A. We found the baby had a complete intestinal obstruction which, inside the abdomen, is determined by the fact that one portion of the intestine, that is the portion above the obstruction, is dilated and below the obstruction is collapsed, and this obstruction in that Jeffcott baby was in the jejunum and that obstruction was due to volvulus, which means to turning or twisting of the intestine around the root of the mesentery as an axis. The axis of the turn is the root of the mesentery. That was the volvulus. The result of that volvulus was that the portion above the obstruction was dilated, as it is in all complete obstructions. The portion below that point was completely collapsed and blue or purple, as the circulation is interfered with by the obstruction. In addition to the two and one-half turns of the volvulus, there were other things. For example, there was a thing that very often goes with that. There was a failure of fusion of different membranes in the upper abdomen, that is, the membrane that connects with the stomach and the large membrane that runs transversely. When you see that, it may be the first indication you have mal-rotation, an evidence of failure of fusion. That was present. That in itself might make you look for a mal-rotation as cause of the obstruction. In addition

(Testimony of Edward J. Donovan.)

to that failure of fusion, this baby had a band, a very thick band, a developmental band, running across this same small intestine that was obstructed. In addition to those things, the duodenum in this baby, the first small part of the small intestine, normally comes down beneath the stomach or transverse colon, and then comes out. In this baby, the duodenum, instead of going down, across and out, came directly down and passed through an opening in this same mesentery of the last part of the small intestine—passed through an opening in that mesentery.

Q. What is the mesentery and what is its function?

A. It is a membrane that really completely surrounds the intestine and suspends the entire small intestine, which consists of about twenty feet, a membrane that completely surrounds it, and then suspends it and allows it to move.

Q. To what is this mesentery attached?

A. To the back wall of the abdomen, and the thing that is called the root of the mesentery is a structure that runs across this way (indicating) and is normally about that long (indicating), so that the small intestine is suspended, through which runs the superior mesenteric artery that supplies blood to every bit of the small intestine, and to half of the large intestine, so that when that turns on the root of the mesentery that blood supply is compromised for all of the small intestine and half of the large intestine.

(Testimony of Edward J. Donovan.)

Q. Was this opening in the mesentery through which the colon passed normal or abnormal?

A. Abnormal. There should be no hole there. [115]

Q. What have you to say as to the normal or abnormal condition existing at that point?

A. I think I have covered it.

Q. What effect, Dr. Donovan, does this impairment of blood supply have upon the portion of the intestine below the point of obstruction?

A. It depends entirely upon how long it is interfered with. In the cases I mentioned that had perforation, the perforation was caused by gangrene of perhaps a little spot or a large section of the intestine. If you interfere with the blood supply of any portion of the intestine sufficiently, it becomes necrotic. It dies.

Q. Necrosis means death?

A. Yes. That necrosis may be a little pin-hole size area or may be the entire small intestine and half the large intestine, as supplied by the large artery, as reported in one of the cases that is in that report.

Q. Explain what was done by you to correct that abnormal condition you found in the Jeffcott baby.

A. The first thing that was done—This volvulus is always turned in a clockwise direction, and you turn it back, counter-clockwise to undo the twist. That was done first, turning it back two and one-

(Testimony of Edward J. Donovan.)

half turns so that the obstruction is relieved, and you determine that by seeing gas and contents of the intestine pass to the collapsed portion. The second thing that was done was to remove the band I have spoken about.

Q. What was that band? [116]

A. It is called a developmental band. It is a band.

Q. What is its substance?

A. It is the same as the lining membrane of the abdomen, the peritoneum.

Q. It was a congenital mal-formation?

A. Yes.

Q. Proceed with the description of the operation.

A. That band was removed. The thing that produces a volvulus is the mal-rotation, and the mal-rotation is the failure of fusion of the right side of the colon or the cecum to the back wall of the abdomen, where it should be attached.

Q. That failure of fusion accounts for the mal-rotation, permits it?

A. Permits it. That cecum and ascending colon is supposed to be attached, the ascending colon, strictly speaking. The cecum is not attached. The ascending colon is attached, and that makes a difference of an inch. The ascending colon normally is attached to the back wall of the abdomen. So, in order to prevent a recurrence of the volvulus, you suture the ascending colon to the peritoneum—to the lining membrane—and in the right lower quadrant, where it should rightly be attached.

(Testimony of Edward J. Donovan.)

Q. Was that done? A. Yes.

Q. What further was done?

A. I think that is all. The abdomen was closed in the [117] usual manner, and in a baby you take particular pains to sew a baby's incision up in layers, and the reason for that is this: A baby's incision is sewed in layers for the reason that children under five years of age have a great tendency to break their incisions open, and the reason for that is that a baby does not lie quietly like an adult, but kicks and moves, and apparently it does not pain him to move as an adult, and provisions must be made against that. And the other point is that the abdominal wall of a baby, even though it has all the layers of an adult, is predisposed to a rupture of the incision. You take each individual layer and sew it with sutures, and in addition you put in a retention suture. You put in a suture of non-absorbent material. These other sutures are absorbable. You don't have to take them out. The retention sutures are made of material that does not absorb. A retention suture is a suture that is passed some little distance outside the incision, through all the layers except the innermost layer, the peritoneum, and comes out on the other side of the incision, and is then tied over a band or rubber cuff so it will not cut into the skin. You never sew up a baby without taking these precautions. Another precaution, in addition to putting adhesive tape on this baby, you put on a bandage.

(Testimony of Edward J. Donovan.)

Q. For what purpose?

A. So he will not break open the incision. There is a great tendency in babies to break open. One other thing I [118] should have mentioned, you use in closing the skin a continuous stitch, a stitch that runs right along without interruption, and the reason for that is that even though a baby may break the lower part of the incision open, oftentimes the skin will stay together, and he may not break open to the extent he will have to be operated upon again immediately.

Q. What effect, if any, does the impairment of the blood supply to a portion of the intestines of an infant below the point of obstruction, have to do with the difficulty of performing the operation?

A. Occasionally it has been interfered with sufficiently so that you have to remove that intestine.

Q. Does it have any effect upon the handling or suturing of the intestine, in case you do not have to remove the intestine?

A. The intestine has to be handled much more carefully, and you have to be careful in suturing it, but I cannot say that that was particularly true of this baby, because you determine when you have relieved the obstruction. Oftentimes it is very dark and often it is a question as to whether you should take it out or leave it, so you do several things, such as hot pads, and you don't close that abdomen until you feel sure you do not have to remove that intestine, and while certainly an obstructed intes-

(Testimony of Edward J. Donovan.)

tine is more prone to infection passing through its wall than a normal intestine, we do not remove it if we can avoid it. [119]

Q. What further care and attention did you extend to the Jeffcott baby after the performance of the operation itself?

A. I saw the baby I don't know how many times. I remained in Tucson until the next morning, I think about eleven o'clock, during which time I definitely determined that the symptoms we had operated upon the baby for had disappeared, and I determined that in this way: That the baby had survived the operation very well and had had four bowel movements before I left, which showed the obstruction had been relieved.

Q. What was your decision before you left for New York as to need for your further attention?

A. I thought the baby was in very good condition, and I thought it was perfectly safe for me to go.

The Court: A little louder.

A. I thought the baby was in excellent condition. I had determined very definitely that the obstruction for which I had operated upon him was completely relieved, and I thought it was very safe for me to go.

Mr. Allen:

Q. Dr. Donovan, did you have any subsequent correspondence with any of the local attendants with reference to that baby's condition after its operation?

(Testimony of Edward J. Donovan.)

A. Yes, sir, I kept in pretty close touch with Dr. Thompson [120] with reference to this baby, and that was done by telephone once or twice perhaps, and by night letter and by airmail.

Q. What, if any, consideration did you give to the information received, and what, if any, advice did you give in response thereto?

A. It was a report on the condition of the baby primarily, because I had asked for a report, and if he asked me any questions about the care of the baby, I advised him to the best of my ability.

Q. Dr. Donovan, you understand, do you not that Robert Jeffcott, the infant in question here, developed a fecal fistula subsequent to the operation?

A. Yes, sir, I was informed of that.

Q. When, Dr. Donovan, did that develop?

A. The ninth day after the operation.

Q. What, in your opinion, Dr. Donovan, was the cause of the development of that fecal fistula?

A. I had a very detailed report about this fecal fistula, and I think that is the time Dr. Thompson called me on the telephone. I cannot be absolutely sure about that, but I think that is the time. I had a very detailed report, and I suggested what should be done about it, and then wrote certain questions again about it, about the fecal fistula, asking if the lining membrane of the intestine had shown up in the fecal. The question I asked was whether mucous membrane had shown up in the fecal fistula. [121] That is a very important question, and I asked that

(Testimony of Edward J. Donovan.)

of Dr. Thompson and got a reply. We talked it over. I don't remember what questions I asked. I stated what I thought should be done about it.

Q. What was your opinion as to its cause?

A. The fact that it was a fecal fistula——

Mr. Robertson: If these opinions were incorporated in any sort of writing, the writing would be the best evidence, and I insist upon the production of such writing.

The Court:

Q. Were those opinions in writing?

A. By writing, by telephone and by night letter. I cannot say how much of this was in my writing. I got a very detailed report of this fistula, and I wrote back certain questions to be answered in Dr. Thompson's next report to me about the fistula, which would help me in determining what to do with it. I cannot say how much was telephone, night letter or letter.

Mr. Robertson: I want the record to show an objection upon my part to any expression of opinion unless written opinions may be produced.

The Court: All right. Go ahead, doctor. [122]

Mr. Allen:

Q. I want to restate my question. I think it was originally what is your opinion now as to the cause of the fecal fistula. That is what I am asking now.

A. The character of the drainage of that being fecal, and that is a fecal fistula, in distinguishing it from an intestinal fistula, means a great deal to me, so I inquired about the drainage, whether it

(Testimony of Edward J. Donovan.)

was definitely fecal. I did state that I thought it was very probably due to the fact that the ascending colon and the first part of the large intestine had been sutured to the right lower quadrant, and that that had either caused an infection there or a necrosis there, because the blood supply of that intestine had been definitely interfered with.

Q. In other words it is your opinion it was due to the damaged condition of the intestine at the time the operation was performed?

A. It was due to the suturing, I mean the fixation, the fact that it was anchored. It was held there.

Q. And the damage to the intestine to which you refer, is that a condition that existed at the time the abdomen was opened, resulting in interference with the blood supply?

A. Yes. Do you want my reason for saying that?

Q. Yes.

A. My reason for stating that is that nine days after the operation is just about the right time for that to happen. One other reason is that this is definitely [123] fecal, so that rules out the small intestine, and it drained through the right side of the incision, so it would not be the left side of the colon that did it, and I thought it was because the right side of the colon was anchored where it had not been before, but where it belongs and has to be anchored to prevent a recurrence of the volvulus.

Q. That anchoring is a necessary portion of the operation for correction of the obstruction?

(Testimony of Edward J. Donovan.)

A. It is not necessary for the correction, but necessary to prevent a recurrence of it.

Q. Now, Dr. Donovan, what, if you know, is the frequency with which the development of such a fecal fistula can be expected in this type of operation?

A. It depends entirely upon the degree of interference with circulation. I cannot quote you any statistics, but it is directly related to the degree to which the blood stream has been impaired, the very same reason that perforation occurred.

Q. And what degree does the extent of impairment of the blood supply to a portion of the intestine, and the length of time during which that impairment has existed prior to operation, have upon the probability that fecal fistula will result from the necessary anchoring of the intestine?

A. Could I say one more thing before answering that?

Q. As far as I am concerned, yes. [124]

A. I think I should state in regard to fecal fistula, this fecal fistula might very well have been caused by infection where the ascending colon was attached, as there might have been a little abscess there, because this type of intestine, an intestine whose blood supply has been compromised by the obstruction, does very definitely prove that in that kind of intestine, organisms may pass through the walls, which they never do normally. The ninth day interval covers that, also that the drainage was likely

(Testimony of Edward J. Donovan.)

from the infected wound, particularly on the fifth day, when the temperature had gone up, which indicated that the drainage was not fecal but became fecal. That could all very well have been due to the fact that an abscess occurred where the membrane had been anchored which drained fecal material.

Q. What would have been the cause of such an abscess at that point?

A. Infection. Organisms either passing through the wall of the damaged intestine or death, necrosis, of a little portion of that intestine, perhaps where sutured.

Q. In both of which your opinion would have been that it was the result of, or growing out of the lack of blood supply in the intestine?

A. Yes, sir.

Q. Now, Dr. Donovan, during the time you were present here in Tucson, did you have any conversations whatever with Mr. or Mrs. Jeffcott, with reference to the cost to them [125] of this service which you had performed?

A. No, sir.

Q. Did they communicate with you by mail or otherwise at any time following your arrival in Tucson and prior to your submission to them of a statement indicating the amount of your charge?

A. No, sir.

Q. When did you determine the amount of your charge for this operation?

A. When did I determine it?

(Testimony of Edward J. Donovan.)

Q. Yes. A. After I had gone back home.

Q. How soon?

A. Sometime within the—I think it was a month before I sent a bill—sometime within that time. I think I operated on the baby either April first or April second, and I sent the bill May first—some-time between those two dates.

Q. Now, Dr. Donovan, what elements or factors do you take into account in the determining of a fee for an operation of this sort?

A. I answered that question in the interrogatories. If I may be permitted, I should like to refer to that answer, so that I may make it in the same language.

Mr. Robertson: I object to any such procedure. I should like to have [126] Dr. Donovan repeat what he took into consideration. Those interrogatories were prepared in Mr. Allen's office, with his assistance. I object to his being permitted to refer to his memorandum.

The Court:

Q. Can you summarize the elements, doctor?

A. Yes, sir.

Mr. Allen:

Q. Go ahead.

A. First, the seriousness of the operation that is to be performed; the age and condition of the patient. Second. I do not mean to put the condition of the patient in the first part. We will say the seriousness of the operation and the age of the pa-

(Testimony of Edward J. Donovan.)

tient. Second, the responsibility that I had to assume in operating on that patient. Third, my experience, my past experience in doing such an operation. Fourth, my knowledge of what other surgeons of the same training charge under conditions that are the same, or similar. Fifth, how much doing this operation is going to interfere with my other duties, such as other operations, appointments with patients, the normal course of my duties, whether it is going to interfere with my caring for any other patients, or seeing a new patient. Sixth, financial condition of the patient or the parents or the responsible person, some member of the family, if it is an adult; the hospitalization, the facilities or set-up.

Mr. Allen: Speak a little louder so that the court may hear you.

A. Well, the set-up, the room in the hospital that the patient has, the room, the nurse, how long the nurse was kept, and so forth. In other words, how much money that patient spends on his surroundings in the hospital.

Q. Now, Dr. Donovan, do you recall any other elements that you took into account?

A. I don't think so.

Q. Now, what elements, what did you have in mind in reference to the element of seriousness of that operation? What detailed elements do you take into account there, doctor?

A. Well, how sick the patient is, and what his condition it. Is he in condition to stand this opera-

(Testimony of Edward J. Donovan.)

tion right now? Should I do it now or wait until three hours from now and give him fluid and things like that. And I am responsible for all of those things. Should he have a spinal anaesthetic or a local anaesthetic? Has the patient diabetes perhaps? Has he any condition that I should know before I operate on him? Diabetes is a very good example of that. If I should operate upon a diabetic patient and not know it, I make a very serious situation for the patient. The same would be true of many diseases among them being high blood pressure.

Q. What detailed elements do you take into consideration [128] in the one you designate as degree of responsibility you assume?

A. Assuming this patient needs an operation, what are his chances of going through with that operation, because, particularly in an older patient, if it entails a great deal of suffering, as the operation may, it is not a bit unusual for a responsible member of the family to say "What are this man's chances of surviving this? Has he a good chance of getting well? If he hasn't, if he is going to suffer a great deal, I am not going to consent to the operation". I have the responsibility for all of that. What are my chances of taking him through such an operation?

Q. What are the details, items, Dr. Donovan, which you take into account in reference to the financial condition of the patient or a responsible party?

A. A great many of the patients that are sent to me, or to most surgeons, are referred patients

(Testimony of Edward J. Donovan.)

from any doctor, a medical man rather than a surgeon. A great many of the patients I see, I know nothing whatever about them.

Q. Why is that?

A. There are several reasons for it. Very often the doctor who has sent that patient to me will say: "Will you operate upon Mr. or Mrs. Jones (or whoever it is) for so much?" And I will say "Yes". Oftentimes the patient will say: "What is this going to cost me?" I can then sit down and talk it over with him or with her, and they [129] will say: "What is my hospital going to cost, and the anaesthetic? What extra charges are there for laboratory tests?" And I can sit down with that patient and go over all of it, insofar as I am able. Lots of patients, if the doctor has not said something about it, or if the patient has not said something about it—and this applies to a good many patients, my only way of determining that patient's ability to pay for the operation is the size of his room, how many nurses he has, how long he keeps them, what efforts he is making to keep expenses down—that is my only way of determining the amount that I should charge that patient.

Q. Now, Dr. Donovan, did you bring up the subject of fee in the Jeffcott case prior to the submission of your statement? Did you discuss it with them in any way?

A. Prior to the statement?

Q. Yes. A. No, sir.

(Testimony of Edward J. Donovan.)

Q. What is your custom in that respect?

A. I have never done it. I have never broached the subject myself to a patient once.

Q. What is the custom among the higher ranking surgeons in the New York area in that respect?

Mr. Robertson: I object to any testimony being given by Dr. Donovan or any other witness in reference to any custom in New York, because it is pure, rank hearsay, and I have no [130] opportunity to go into any such custom or practice. Such question assumes facts not in evidence in this case, and moreover a custom, unless it was acted upon in this case, is not admissible anyway, and moreover the patient was not in the city of New York, nor were the negotiations carried on in New York.

The Court: That was discussed to some extent yesterday.

Mr. Robertson: Yes, but these others are new elements. How can the defendants properly rebut any statements he may make here of what he may have heard from other people. It is purely the contractual relationship between Dr. Donovan and the Jeffcotts, if any existed. He can testify only as to what was done between them.

Mr. Allen: If it please the court, if it were purely a question of contract, there might be a very pertinent point in this objection, but it is not a question of contract, other than that the law implies a contract that these parents intended to pay a reasonable value and customary charges of the doctor

(Testimony of Edward J. Donovan.)

or surgeon who performed the operation which was needed by their infant son. It is incumbent upon the court here to determine the facts and circumstances that may have a bearing upon what constitutes a reasonable [131] charge for those services, looking into the service and the facts and circumstances surrounding the operation and the parties thereto. I believe it is conceded, so far as the law in this case is concerned, that a surgeon may show the condition, financial condition, of the responsible party, the defendants in this case. We have a question here—this witness has testified that in determining the fee, that he takes into account the financial condition——

The Court: That is the doctor's practice?

Mr. Allen: Yes. He has testified that he takes into account the negotiations. He has testified that he did not initiate any negotiations with these defendants as to the amount of fee prior to the submission of his statement, that is, prior to the determination of the amount of his charge. Now the examination is directed as to his reasons for that, and the court well knows that the members of the medical profession have very definite rules, very definite methods of procedure, and this testimony indicates that it is not his custom to do so. As to what is the prevailing custom or rule or practice, I think is pertinent to the court.

Mr. Robertson: This is a suit based upon an implied contract. He has [132] already testified that

(Testimony of Edward J. Donovan.)

it is not his custom to negotiate with a patient with regard to the fee. Therefore, if other doctors follow that custom, or, on the other hand, if they have a contrary custom, it is of no value to the court here, because his custom is to the contrary. He says: "No, I do not communicate with the patient, but simply send a bill". Of what value would it be to the court to show that all of the other doctors in New York do communicate with their patients before sending a bill. This must be based upon hearsay. It is impossible for Dr. Donovan to know how fifty-one percent of the doctors in New York do a certain thing. He may know a few who do it a certain way, but that does not establish any custom and usage, and is not sufficient to permit him to testify as to custom and usage in a court of law.

Thereupon the court announced a ten-minute recess, after which the trial was resumed.

The Court: In the recess, I have not been able to find any authority on the point of the question as to the testimony that the practice of physicians in the locality where he is located is the practice which he followed in this case. Your objection to it is that it brings into the record hearsay?

Mr. Robertson: That is correct, and as to assuming facts not in the [133] record, and it not being possible for us to examine persons who may have told them of any practices they had. I might add that I have not found any cases where any such consideration is considered by the court as one of the measures of deciding upon a fee.

(Testimony of Edward J. Donovan.)

The Court: The witness has already testified as to the elements he took into consideration in determining the amount of his fee.

Mr. Allen: And he has further testified that he did not initiate any discussion of fee himself, and now the inquiry is as to his reason for failing to initiate any such discussion.

Mr. Robertson: He says it was not his custom to ever contact a patient before——

Mr. Allen:

May I withdraw the question, your Honor, and save a lot of argument?

Q. Dr. Donovan, what arrangements were made for the care of your patients and practice in New York during the time you devoted to the Jeffcott case?

A. I was in Atlantic City and intended to be away until Sunday night, and I had arranged with a man, a doctor, [134] there to look after my patients while I was gone. Mrs. Donovan——

The Court: A little louder.

A. When I was asked to go to Tucson, I did not have time to make any arrangements myself. Mrs. Donovan called New York and said that I was going to Tucson, and asked this same doctor if he would continue to take care of my patients.

Mr. Allen:

Q. And what was done in that regard?

A. He did that. I did not at that time know how long I was going to be gone, or anything about it.

(Testimony of Edward J. Donovan.)

Q. Now, Dr. Donovan, what transfusions and infusions, if any, were given this Jeffcott baby subsequent to the operation, and why?

A. He was given a transfusion immediately after the operation. He was given then a continuous infusion, which is called an intravenous drip, that is, fluid in small quantities continuously, over a period of time.

Q. What was the purpose of that?

A. The purpose of a transfusion of blood immediately after an operation is to help to overcome the shock of that operation. It is just given on the general principle that there will be shock, and is given to help overcome that shock. [135]

Q. What is the purpose of the continuous infusion?

A. Where you have operated upon a portion of the stomach or intestinal tract, you have to be careful in giving fluids by mouth, and you have to give him fluids by hypodermic or in his vein, which is known as an infusion. The purpose is to keep his body fluids balanced, because if you do not keep his body fluids balanced he is not only uncomfortable but may vomit from lack of fluids which he cannot or should not take by mouth.

Q. These were part of the normal post-operative care?

A. Yes, sir.

Q. You have testified that you did not initiate any negotiations or conversations with these defendants relative to the amount of the fee, or their

(Testimony of Edward J. Donovan.)

financial ability to pay a fee. Why did you not initiate any such negotiations?

A. I had never done it before, nor have I done it since.

Q. Dr. Donovan, what elements or indications as to financial condition or ability to pay a reasonable fee did you take into account in this particular case, the Jeffcott case?

A. Well, I had been told——

Mr. Robertson: Just a moment. I object to the question, because appearances constitute no evidence of the true financial condition of the parties. [136]

Mr. Allen: That's a novel theory.

The Court: The witness was asked what appearances he took into consideration. Go ahead with the answer.

A. I had been told before I came that expense was no item, which I think at least assured me——

Mr. Robertson: I object to what he was thinking about.

The Court: Just what you took into consideration, doctor.

A. I repeat then that I was told before I came that expense was no item. I took into consideration the fact that money was never mentioned to me all of the time I was here, I mean, in regard to my fee. I took into consideration the same picture that I have stated I used in determining the finances of a patient, as I saw it when I came to Tucson, which was as follows: There was a small baby in a large

(Testimony of Edward J. Donovan.)

room, with four nurses taking care of him. There were three doctors in attendance and a surgeon had been called from New York to operate on him. I saw no evidence while I was in Tucson that anyone connected with the patient was worrying about expense. I think that is all. [137]

Mr. Allen:

Q. Now, Dr. Donovan, taking into account all of these matters concerning which you have testified, namely, your school training, your internships, your past experience, and, in general, all of those matters tending to indicate your qualifications, performance of the particular operation in issue, taking into consideration the negotiation for your employment, the nature of that negotiation; taking into consideration your employment as you have outlined it in full, and the performance thereof; taking into consideration the condition of the Jeffcott baby as you found it, what you did for the correction of that condition, the results therefrom; taking into account also the surrounding circumstances under which you were employed and did perform the operation; taking into consideration the communications to you and the information had by you in relation to your employment, and in the course of your employment, having to do with the financial condition of the parents of the Jeffcott baby, and, in fact, taking into consideration all of your knowledge concerning this matter, as you have testified here, what did you regard, on or about May 1, 1939, as

(Testimony of Edward J. Donovan.)

being a reasonable charge constituting the reasonable value of the services which you performed?

Mr. Robertson: I object to the question, if the Court please, because [138] in the first place it assumes facts not in evidence. He has testified that one of the considerations in normal cases in fixing a fee is the knowledge of what other surgeons charge for a service of a similar nature. That is based purely upon hearsay. I object further upon the ground that the question calls for his opinion at the time of the operation, or at the time the bill was sent. The evidence in this case discloses the true financial circumstances of the defendants. He has offered himself the evidence of their true financial circumstances, and so his opinion, without any thought being given to the true financial circumstances of the defendants, is of no assistance to the court in this case.

The Court: The question may be answered.

Mr. Allen:

Q. What in your opinion, on or about May 1, 1939, when you billed the Jeffcotts, constituted a reasonable charge for your services?

A. Twelve thousand five hundred dollars.

Q. Now, Dr. Donovan, at that time, as indicated by the correspondence in evidence here, you had had no information or communication or statement whatever from the defendants relative to their financial condition?

A. No, sir.

Q. And at that time, your knowledge concerning their finan- [139] cial condition consisted of that

(Testimony of Edward J. Donovan.)

which you had taken into consideration. Is that correct? A. Yes, sir.

Q. Now Dr. Donovan—May I have plaintiff's exhibit 1, I believe it is, or 2?—I hand you Plaintiff's Exhibit 2 in evidence and ask you to glance through it and refresh your memory as to the substance of that exhibit. I do not think you need to read it in full, doctor. From your examination of that, you recognize that, do you, as the letter which Mr. Jeffcott wrote after receiving your statement, in which he stated his financial condition?

A. Yes, sir.

Q. Now, I will ask you to state, Dr. Donovan, whether or not your opinion as to the reasonableness of your charge for your services in this case was changed in any wise by the advice contained in Plaintiff's Exhibit 2, relative to the condition, the financial condition, of Mr. and Mrs. Jeffcott, as they stated it to exist on May 22, 1939?

A. No, sir.

Q. In other words, had you been advised by the defendants prior to determining your charge and submitting your statement that their financial condition was as stated in that letter, Plaintiff's Exhibit 2 in evidence, your charge for the services performed would have been in like amount?

A. Yes, sir. [140]

Q. Now, Dr. Donovan, I believe you testified somewhat with reference to past experience of Dr. Downes, Dr. William A. Downes, in the perform-

(Testimony of Edward J. Donovan.)

ance of pediatric surgery or surgery involving infant cases. Will you state in detail your knowledge of the extent to which he devoted his practice in New York to pediatric surgery?

A. He had exactly the same, Dr. Downes had exactly the same positions that I have today in New York, and I stated that Dr. Downes was probably one of the first surgeons in this country who attempted to separate the surgery of infants and children from adult surgery. Dr. Downes was known all over the country as an excellent surgeon, as an authority on surgery, of a great many varieties, and as one of the pioneers in surgery of infancy. Dr. Downes also did adult surgery. He had the very same services that I have now, at Babies Hospital and St. Luke's Hospital, and Dr. Downes did about the same proportion of baby surgery that I stated I was doing yesterday, as I would think about fifty percent baby surgery and fifty percent adult surgery. Dr. Downes wrote a great many articles on pediatric surgery, reported a great many cases, and Dr. Downes and Dr. Boling did report the greatest number of operations on babies in certain groups of abdominal surgery. Dr. Downes reported operations for a great many unusual abdominal conditions in babies.

Q. Now, Dr. Donovan, are you acquainted with Carl G. Burdick, of New York? [141]

Mr. Robertson: I move to strike the testimony given by Dr. Donovan in reference to Dr. Downes,

(Testimony of Edward J. Donovan.)

because the only purpose it could serve would be to corroborate the depositions of the doctors, and the testimony at this time of building up these men is absolutely immaterial. Their own testimony as to their qualifications speaks for itself, and then if we attack them, perhaps Dr. Donovan can testify as to their positions.

The Court: It was occurring to me while the doctor was giving his testimony as to Dr. Downes, whether he collaborated with you in the pamphlet that was presented here this morning.

A. No, as I stated yesterday, he was the man under whom I trained.

The Court: I do not see the materiality of this testimony at this time.

Mr. Robertson: Is the motion granted?

The Court: Yes.

Mr. Allen: I think it is admissible evidence bearing on the qualifications and type of training this man has received, but [142] as to Dr. Burdick, I will consent to the propriety of the objection, but I believe the evidence is material as to Dr. Downes, in view of his connection with Dr. Donovan.

The Court: It might be if there were any record contradicting the qualifications.

Mr. Allen: If the court please, I am about to reach the conclusion of this witness' testimony, and would like at this time to ask if the court desires to interpose any examination as to any of the scientific aspects of the case, as well as any aspects of

(Testimony of Edward J. Donovan.)

the case. I have attempted to keep the scientific features of the case in as understandable language as possible, but I do not know whether or not there is any question in reference to the nature of this operation which the court would like to ask at this time.

The Court: No, I have followed it closely and with interest, and I think the court has a picture of what was necessary and what was done, so I have not anything in my mind at this time.

Mr. Allen: I ask the court's indulgence that I may retain this witness on direct until after the noon recess, as his testimony [143] is rather involved and detailed.

Thereupon the court recessed until two o'clock in the afternoon, at which time the trial was resumed.

Mr. Allen: The plaintiff is ready.

Mr. Robertson: Defendants are ready.

Mr. Allen:

Q. Dr. Donovan, what form of incision was made for the purpose of performing the operation on Baby Jeffcott?

A. What is called a right rectus incision, which means that you make the incision in the right rectus muscle, which is the large muscle which runs up either side of the mid-line of the abdomen. This means you incise that muscle and separate it.

Mr. Allen:

You may cross-examine.

(Testimony of Edward J. Donovan.)

Cross Examination

By Mr. Robertson:

Q. Dr. Donovan, do you really think that your time and services were worth six thousand dollars a day for the time you devoted to this case?

A. Mr. Robertson, I don't think the time enters into this [144] matter at all, as far as I am concerned.

Q. Do you think you were worth six thousand dollars a day in this particular instance?

A. Yes, I certainly do.

Q. And your gross earnings for that year, the year of 1939, amounted to forty thousand eight hundred and some dollars?

A. Yes, sir, that is cash.

Q. That is what you actually earned and received in 1939?

A. That is not necessarily what I earned. That means what I was paid for.

Q. You keep your books on a cash basis?

A. Yes, sir.

Q. You actually collected forty thousand eight hundred and some odd dollars that year?

A. Yes, sir.

Q. You billed Mr. Jeffcott approximately one-third of that amount for the time and work you did on this particular case?

A. I did, yes, sir.

Q. As I understand it, doctor, you were in Atlantic City at the time Dr. Thompson first communi-

(Testimony of Edward J. Donovan.)

cated with you? A. That is right.

Q. And you had planned to be away from your work and office and had made arrangements with another doctor to take care of your patients until Sunday night? A. That is right.

Q. And any emergencies that might come up? [145] A. Yes.

Q. When did you get back to New York after your trip to Tucson?

A. I got back to New York about, perhaps, three hours after I got into Newark. I landed in Newark, I would say, some time between ten and twelve o'clock.

Q. What time did you leave Tucson?

A. At eleven o'clock, but I had an entirely different type of plane than the one I came out on. I had a plane that I would think made at least twenty stops, as near as I could guess.

Q. You took the daylight flight that left Tucson at what time?

A. Roughly at eleven o'clock.

Q. That was your preference, in that you wanted to see the country? You preferred that flight instead of the Mercury flight that left here that evening?

A. I know nothing of the Mercury flight. I know nothing of it now. I could not get reservations on the evening plane.

Q. Did you attempt to get reservations?

A. I did.

(Testimony of Edward J. Donovan.)

Q. What time did you leave here?

A. About eleven o'clock, I think, before noon. I think it was roughly about eleven o'clock, as I remember.

Q. So you were back in New York approximately at noon on Tuesday?

A. I would say noon. I had to go from Newark to Inglewood. [146]

Q. The total lapsed time you were away from New York was roughly sixty to sixty-five hours? Saturday evening, Sunday, Monday, Tuesday?

A. About sixty hours, did you say?

Q. Yes. A. About that, yes, sir.

Q. You left Newark around six o'clock on Saturday evening? A. Six-ten.

Q. You had driven up from Atlantic City?

A. I came on the train.

Q. You had your dinner on board the plane?

A. I had my dinner. I do not know where I had it. Yes, I think probably I had dinner on the plane.

Q. The records of the American Airlines show you had good weather.

A. We left Newark in a pouring rain, and the radio beam out of Washington was out of commission and we had to go over the Alleghenys.

Q. You simply took the alternate route out of Washington?

A. Yes, but we left in a rainstorm, pouring rain.

Q. Would you attempt to qualify as an expert as to whether that was good or bad flying weather?

(Testimony of Edward J. Donovan.)

A. When we got to Pittsburgh there was ice on the windows, and I am sure there was ice on the wings. I know nothing about it.

Q. Have you been on a plane since?

A. No, never before nor since. [147]

Q. It was a sleeper plane and you arrived in Tucson at six o'clock?

A. Six-thirty, I believe.

Q. And Dr. Thompson met you at the airport?

A. That is right.

Q. And took you immediately to the Desert Sanatorium? A. Yes, sir.

Q. There you consulted with Dr. Thompson and Dr. Carrell. Was Dr. Tappan there?

A. I don't think she was there when we arrived. She was there later.

Q. You reached the decision that an operation was necessary and Dr. Carrell, I believe you said, made arrangements to get the necessary instruments you would need?

A. He asked first what I needed, and then got what I asked for.

Q. Did you see Mr. Jeffcott or Mrs. Jeffcott when you got there?

A. I saw Mr. Jeffcott, but I don't remember whether it was before or after the operation. I saw Mrs. Jeffcott after the operation.

Q. To refresh your recollection, is it not a fact that you saw Mrs. Jeffcott the first time immediately before the operation, while she was being bathed,

(Testimony of Edward J. Donovan.)

and dropped in again shortly after the operation?

A. I cannot say. I am not sure about before the operation. I certainly saw her afterwards. [148]

Q. Is it not a fact that the first time you saw Mr. Jeffcott was shortly after the operation?

A. He was standing in the hall or corridor, and I cannot say whether it was before or after the operation.

Q. And at that time the operation had been completed, and you were discussing the operation with Dr. Hugh Thompson, Dr. Tappan and Dr. Carrell, and perhaps Dr. Van Horn?

A. At that time?

Q. Yes.

A. I will tell you exactly what I did. I walked from the operating room, I think across the hall, which is the doctors' room, and took off my operating clothes, and there were a number of doctors there, and we did talk about it. Also on the trip I mentioned this morning that Dr. Carrell took me on, either before or after going to church, we passed Mr. Jeffcott in a car.

Q. He was on his way to the San?

A. I could not tell you, sir.

Q. After you decided an operation was necessary, you went to church and Dr. Carrell went to get the instruments you wanted, and you commenced the operation at approximately ten o'clock in the morning?

A. Yes, sir.

Q. Your operation took how long?

(Testimony of Edward J. Donovan.)

A. I cannot say exactly, but my estimation is that it took an hour.

Q. Roughly an hour?

A. Yes, roughly an hour. [149]

Q. That would be approximately eleven-thirty?

A. Yes, it takes a little while to get the patient ready. My feeling would be that the actual operation took about an hour.

Q. As soon as you were dressed again, after taking off your operating clothing, you dropped into the room where Mrs. Jeffcott was being kept, didn't you? A. Yes.

Q. And Mrs. Jeffcott and Mr. Jeffcott and Mrs. Carrell were in the room at the time? There were several people in the room?

A. I could not say as to that.

Q. You have no recollection of that?

A. No, I have not.

Q. And then you and Dr. Carrell left the Sanatorium? A. After lunch, I think.

Q. Did you have lunch at the Sanatorium?

A. Yes.

Q. Do you recall with whom you ate?

A. No, sir, I do not. I ate in the room that I think is set aside for the doctors.

Q. At any rate, you sat in company with the doctors?

A. No, sir, not necessarily.

Q. Wasn't Dr. Carrell with you all of the time?

A. I cannot say. Dr. Carrell invited me to play

(Testimony of Edward J. Donovan.)

golf with him that afternoon, but whether he had lunch with me I do not remember.

Q. You went out to the golf course? [150]

A. Yes, we played eighteen holes, and probably spent two and one-half hours there.

Q. Do you recall when you got back to the Sanatorium?

A. I don't think I do. I do not know where I had my dinner, probably at the hospital. I think I was back at the hospital probably between five and six o'clock.

Q. To refresh your recollection, is it not a fact you had your dinner with Dr. and Mrs. Thompson?

A. Yes, I did. I had forgotten.

Q. She had a few friends in and had dinner at her house?

A. No, I think we went out for it. Let me think about it for a moment. I think we went out for it. I don't think we had it at Thompson's house.

Q. Mr. Jeffcott was not on the party?

A. Not on the party?

Q. Yes. A. No, sir.

Q. And you came back to the San and spent the night at the San? A. Yes, that is right.

Q. Did you check the baby's chart, or see the infant when you came back to the San?

A. I did indeed.

Q. You spent the night and the next morning you again saw the baby and checked the charts?

A. Yes, sir.

(Testimony of Edward J. Donovan.)

Q. And decided you were leaving on the eleven o'clock [151] plane, or it was decided for you, that you were leaving on the eleven o'clock plane, instead of in the evening?

A. I think I decided that for myself.

Q. You were unable to get reservations on the evening plane?

A. I see what you mean now.

Q. Can you recall whether you announced to anyone, or whether it was circulated, that it was your original plan to leave on the plane Monday evening?

A. I do not know that I did.

Q. Would you say that Mr. Jeffcott's information was erroneous if it was his understanding you were leaving on the evening plane?

A. When I left, I had no idea when I was coming back—when I left Atlantic City, I had no idea when I was coming back, and I don't remember that, sir, whether previous to that time, at eleven o'clock in the morning, or some time that morning, I stated that I was going back on the evening plane. I do not remember that I said that, sir.

Q. And the next morning, just before you left to catch your plane, I believe you dropped into Mrs. Jeffcott's room? A. That is right.

Q. Do you recall that she said that her husband would be sorry not to have seen you before you left?

A. It is possible. I do not remember that.

Q. You don't remember that?

(Testimony of Edward J. Donovan.)

A. No, sir.

Q. When did you first attempt to secure your reservations on the plane, doctor? [152]

A. Back from here?

Q. Yes.

A. I cannot tell you, sir. I don't remember a thing about it. All I remember is, and I don't remember who told me that, whether the Desert Sanatorium, or whether I called myself, that I could not get a sleeper plane back. I do not remember really at all.

Q. But you did leave approximately eleven o'clock in the morning?

A. About eleven-thirty.

Q. And you understood that Mr. Jeffcott had had to go to the ranch?

A. I did not ask where Mr. Jeffcott was, and I do not know that I was told.

Q. You don't remember that Mrs. Jeffcott told you that? A. She may have.

Q. Therefore, Mr. Jeffcott had very little opportunity to speak to you concerning a matter which should be so private as the discussion of a fee?

A. I would not believe that at all.

Q. You were constantly with these doctors?

A. No, all Mr. Jeffcott has to do to see me, or anyone else, is to speak to me, and I will come out.

Q. Would you think it would be the proper thing to do? A. I believe it is.

Q. Would it have been all right for you to have seen him about your fee?

(Testimony of Edward J. Donovan.)

A. There is every reason why I should not. [153]

Q. Why not?

A. I don't believe it is my place to look him up about my fee or approach him in any way about my fee.

Q. Did you attempt to get into touch with Mr. Jeffcott himself to explain to him what was done, and what was wrong with the baby?

A. Will you please repeat that question.

The Reporter: (Reading)

Q. Did you attempt to get into touch with Mr. Jeffcott himself to explain to him what was done, and what was wrong with the baby?

A. No, sir.

Mr. Robertson:

Q. That is perhaps a customary thing for a person to do, is it not?

A. I told Mrs. Jeffcott. I don't think it was necessary to call Mr. Jeffcott and tell him. I certainly assumed he would hear it.

Q. There are no ethical restrictions about doing that?

A. There is an obligation on my part to do it. I told one prominent member of the family what was wrong with the baby, and what was done to correct that.

Q. How many times did you communicate with Dr. Thompson concerning this infant after you went back to New York?

A. I cannot tell you the exact number. I would be glad to try. [154]

(Testimony of Edward J. Donovan.)

Q. Do you have your records available?

A. Do I?

Q. Yes.

A. Mr. Allen has them.

Q. I wonder if you will consult with him and see exactly how many times you talked with Dr. Thompson on the telephone or communicated with him by means of telegram or letter?

Mr. Allen: There is all the material I have on the matter. (Handing papers to witness.)

A. These are six letters from Dr. Thompson to me. There is no record of telegrams or telephone messages.

Mr. Robertson:

Q. Now, do you have the letters you wrote to Dr. Thompson, or copies of them?

A. Whatever material I have is in Mr. Allen's hands. I cannot say.

Mr. Allen: Those six letters are all I have, Mr. Robertson.

Mr. Robertson:

Q. You have no record of any answers to these letters?

A. Whatever material I have was turned over to Mr. Schmidt and from Mr. Schmidt to Mr. Allen. [155]

Mr. Allen: That is all I have.

Mr. Robertson:

Q. Except for two instances when Dr. Thompson called you on the telephone, apparently that is the only time you ever responded to inquiries he made?

(Testimony of Edward J. Donovan.)

A. I am absolutely sure that is not so.

Q. What independent recollection have you that you have written to him?

A. I have no recollection that I think is pertinent on that question. Mrs. Jeffcott or Mr. Jeffcott asked if I would report to Dr. Hamblin, who is a doctor in New Jersey and related to Mr. or Mrs. Jeffcott, and every time I had any information about the progress of this baby, I reported to Dr. Hamblin each time.

Q. You did not communicate with Dr. Thompson except two times by telephone?

A. I communicated with Dr. Thompson a great number of times.

Q. By letter?

A. I would say very truthfully and very accurately that I had a very close contact with this case.

Q. You would say Dr. Thompson sent you these reports? A. Yes.

Q. But you cannot say you sent letters or telegrams in response to those letters?

A. I know I did, but I cannot prove it.

Q. How much time would they consume? [156]

A. You mean to write the letters?

Q. In responding to his reports.

A. Not very much time; very little time.

Q. Did you talk to any member of the family other than the brief introduction you had to Mrs. Jeffcott before you performed the operation?

(Testimony of Edward J. Donovan.)

A. No, sir.

Q. Had you found out anything about the financial condition of the parties before you performed the operation?

A. No, sir.

Q. Did you know anything about the grandparents?

A. No, sir.

Q. And, in fact, you did not know that this was the sole grandson until after the operation was performed?

A. Before I performed the operation?

Q. Yes.

A. No, sir, I did not. Excuse me just a moment. May I correct that. I will change that a little bit. Someone mentioned that fact during the consultation, but who it was, I cannot say.

Q. But that did not weigh down very heavily upon your mind in the responsibility you felt for the child?

A. I would feel the same responsibility if I were going to operate on a child, whether he were the first or the tenth.

Q. I appreciate your honesty, doctor. Therefore, that part of the responsibility constitutes no part of the foundation for your charge, whether he is the sole grandson, [157] and his grandparents are worth a million or a thousand or nothing?

A. No, sir; no, sir.

Q. How much would you have charged for this operation, doctor, had it been performed in New York City?

(Testimony of Edward J. Donovan.)

A. Well, I cannot say exactly. I would have proceeded just as I stated this morning. If Mr. Jeffcott had spoken to me about it beforehand, or Mrs. Jeffcott, or anyone, I would have been very glad to talk the situation over with them, and if Mr. Jeffcott had put the baby in my care, I would have proceeded exactly as I stated this morning. For semi-private, I would have charged so much; if in a small private room, I would have charged so much; if it were in a large private room, I would have charged more. I would have proceeded just as I stated this morning.

Mr. Robertson: I submit, your Honor, that that question can be answered in a more definite way, and I insist that Dr. Donovan do so.

Mr. Allen: I submit, your Honor, that that question constitutes improper cross-examination.

A. It was not performed in New York. [158]

The Court: The witness is testifying as to the circumstances, but the witness can answer as near as you can what the charge would have been in New York. If the circumstances were different, you may answer accordingly. Has that been made clear to you, doctor?

A. Yes, sir.

The Court: All right, go ahead.

A. I would say I would have charged, oh, somewhere between thirty-five hundred dollars and five thousand dollars.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Between thirty-five hundred and five thousand dollars? A. Yes.

Q. That is a span of fifteen hundred dollars, doctor? A. Yes.

Q. Your charges are very elastic, aren't they?

A. I don't think so.

Q. Doesn't fifteen hundred dollars mean very much to you?

A. It means a whole lot, of course.

Q. How can you just say you would have charged thirty-five hundred to five thousand dollars?

A. That would have depended entirely upon the hospital accommodations and moneys spent on the baby in the hospital. That is oftentimes the only way in which I have to distinguish between two parties, as to what they should be charged—[159] ed.

Q. So you would have charged, taking an average, four to five thousand dollars for that operation in New York. That takes care of your schooling, your professional standing, the responsibility assumed, the knowledge of what other surgeons would charge for the same operation, or similar operations—I think that you injected that into your answer this morning—and leaves only how much it interfered with your other duties and the financial condition of the patient to justify the difference between four thousand dollars and five thousand two hundred dollars, and a total of twelve thousand five hundred dollars. Now, doctor, taking those

(Testimony of Edward J. Donovan.)

items in the order I have named them, how much of that would you figure for interference with your other duties?

Mr. Allen: I object to the form of the question, your Honor, on the ground it is an argumentative form of question, and not proper cross-examination.

Mr. Robertson: I submit this is a very intelligible question, and he knows what I am getting at. I want him to justify the difference between thirty-five hundred to four thousand dollars, and twelve thousand five hundred dollars, whether it is for taking a trip by airplane, being away from his office, or what makes up that difference. [160]

The Court: Go ahead.

Mr. Robertson:

Q. How much of that difference, doctor—let us take a fee of four thousand two hundred and fifty dollars, so there won't be any quibbling—we have a difference of eight thousand two hundred and fifty dollars that you charged for making the trip from New York to Arizona. What part of that do you attribute to the hazards of the flight?

A. To the hazards of the flight I attribute a good deal of it.

Q. All right. How much?

A. Oh, certainly five thousand dollars.

Q. So you charged five thousand dollars for making a flight from New York to Tucson and return?

A. I did not say that.

Q. You attribute five thousand dollars of your fee to the hazards of the flight?

(Testimony of Edward J. Donovan.)

A. To me, yes, sir.

Q. Were you, by any chance, aware of the exact figures, or the approximate figures, of the American Airline, that up that time they had had six hundred and fifty million passenger miles without any fatality of any kind?

A. Yes, I had seen that, but that meant nothing to me at all.

Q. Didn't give you any feeling of security?

A. Not the least bit.

Q. Are you aware of the fact that accident statistics show [161] that travel in an airplane in 1939 was considerably safer than travel by automobile?

A. That means nothing to me. This was my risk. If a man as good as Wiley Post can get killed flying, so can I.

Q. When your number is up, you will be called?

A. I do not know what you mean by that.

Q. I will withdraw the remark. So that five thousand dollars of this additional eight thousand two hundred and fifty dollars, you figured in because of the hazards of the flight. You had already made arrangements to be away from your office up until Sunday night or Monday morning, so, as far as you know, there was no loss of business in that time?

A. That does not mean I might not lose something.

Q. Do you know of any single piece of business you lost in that time?

(Testimony of Edward J. Donovan.)

A. I have no way to find out.

Q. You have an office in New York?

A. I do indeed.

Q. Can you state whether any attempt was made to reach you at your office or at your home?

A. I could not say three years later.

Q. But you do have a pretty good recollection?

A. I might be away from my office ten hours and lose three cases. It has happened to me in less time than that.

Q. You might have, but do you know of a single piece of business you lost?

A. My reply is that I cannot state that. [162]

Q. Who was the other doctor with whom you arranged to take care of your patients while you were away?

A. The doctor who was there then is a doctor who was with me in the office for about five years previous to this time, or perhaps a year previous to that time. He is a man who had been associated with me in my old office.

Q. Who is? A. Dr. Heeks.

Q. Did he make any charge for taking care of your patients while you were away?

A. I don't know.

Q. It is not customary, is it, doctor?

Mr. Allen: I object to his answering that question.

A. I have to pay someone for everything that is done. If I go away, I not only lose the patients, but pay for what work is being done for me.

(Testimony of Edward J. Donovan.)

Mr. Robertson: This is a court of law, and it is incumbent upon you to justify a charge of three thousand two hundred and fifty dollars to cover loss of business. I am giving you an opportunity to do that, and you have not done it.

Mr. Allen: I object to his arguing with the witness.

The Court: Proceed. [163]

Mr. Robertson:

Q. I was explaining to the witness why I insist he can tell us how much he paid this doctor for the work he did while you were away from the office?

A. I cannot answer.

Q. Do you have a recollection of paying him anything?

A. Oh, yes, during the course of the year Dr. Heeks has done other work for me, but I do not remember what it was.

Q. Do you pay him by the month?

A. No, I would pay him for what he did for me each six months, or something like that.

Q. How does he bill you, doctor? How does he bill you?

A. I think he has put in a bill, but I am more apt to send it to him without a bill.

Q. Do you make him a donation, or send him a present, or something of that nature?

A. No. I would have a statement of what work he had done for me, probably, either oral or written, an account of what he had done for me, and I would

(Testimony of Edward J. Donovan.)

try to pay him for it, following no specific or settled rate, but what I thought it was worth.

Q. In summing up this part, doctor, you cannot tell us of any specific piece of business you lost by being out of your office on Monday?

Mr. Allen: I object to the question as having been asked and answered. [164]

The Court: Go ahead.

Mr. Robertson:

Q. You cannot give us any definite evidence of a single piece of business you lost, or evidence of anything you paid Dr. Heeks for anything he did for you while you were out of town?

Mr. Allen: I object to that question as assuming an untrue state of facts. The witness has given evidence, has testified on direct, what the situation is, and this question assumes a situation not in evidence.

The Court: Answer the question.

A. I cannot furnish such proof, no sir.

Mr. Robertson:

Q. While here? A. Today.

Q. This is the trial of the case, and it is now that I am asking the question.

Mr. Allen: Object to that as being facetious and immaterial.

The Court: The objection is good. [165]

Mr. Robertson:

Q. So far as three thousand two hundred and fifty dollars of that fee is concerned, you cannot

(Testimony of Edward J. Donovan.)

furnish any definite evidence of loss of business, to justify including that as a part of your charge against the Jeffcotts, can you?

A. May I ask a question?

Q. Yes, go ahead.

A. Will you mind telling me how you arrived at this three thousand two hundred and fifty dollars?

Q. You testified that had this operation been in New York, and you had found the patient in the same condition you found this patient, and the parents, your charge would have been between thirty-five hundred and five thousand dollars; so I told you that to simplify the matter, I would take a fee of four thousand two hundred and fifty dollars, which would have been the probable charge you would have made in New York City. Then you said it was worth five thousand dollars to make the flight from New York to Tucson, so that absorbs five thousand dollars of the amount of difference between the amount you would have charged a party in New York, and what you charged the Jeffcotts. So we have three thousand two hundred and fifty dollars to be absorbed by the loss of time, interruption of your duties, and so forth.

A. May I ask another question about it?

Q. Yes.

A. Why am I not allowed five thousand dollars for that fee? [166] This is all on the supposition that the baby went to New York?

(Testimony of Edward J. Donovan.)

Q. Yes.

A. Why am I not allowed five thousand dollars right there? Suppose the baby had a great big room and had four nurses, and there was no evidence, so far as I could see, of any attempt to cut down expenses, and suppose no one had said anything about expenses to me, why should I not be allowed the upper figure stated there?

Q. All right, I will give you the upper figure. Now, you have no evidence to justify the twenty-five hundred dollars difference, have you?

Mr. Allen: Same objection, that the questions are not capable of intelligent answer. Object to the form of the question. The proper form of cross-examination would be "Why."

Mr. Robertson: The record shows he has no evidence to justify that.

Mr. Allen: If he wants to know how he justifies it, all right, but not to assume something wholly improper.

The Court: Doctor, you may explain the different elements that you considered in determining you were entitled, as reasonable compensation for the operation, the amount you claim here. In other words, what your fee is based on. [167]

Mr. Robertson: The witness has done that and this is cross-examination, and I am asking the question to find how he would justify his fee of five thousand dollars, if the operation were performed in New York, because he has admitted there was

(Testimony of Edward J. Donovan.)

at least seventy-five hundred dollars charged solely because the operation was in Tucson instead of New York.

The Court: Doctor, do you want to make any further explanation in arriving at the different items? You may do so, if you desire.

A. Your Honor, it is difficult for me to make an intelligent answer. It was not done in New York. How could I make an intelligent answer to such a thing? It was not done in New York. I have to stop and think about it. Why should I be expected to answer that? It was not done in New York at all. How can I tell you how much I put to this and to that and the other thing? It was not done there at all. I admit I cannot answer it intelligently. It was not done there. I do not see why I have to answer it. Excuse me.

Mr. Robertson: We fail to see why Mr. and Mrs. Jeffcott should pay twelve thousand five hundred dollars and that is why we are trying to get the doctor's explanation. [168]

Mr. Allen: There is a question before the court, and an objection to it, and I think possibly a ruling on it at this time might clear up this situation we have run into.

The Court: The witness now is under cross-examination at this time, and a pretty wide latitude is accorded the opposing counsel to go into the elements of the total amount.

Mr. Allen: Counsel is asking the witness a question? He says you are unable to produce evidence,

(Testimony of Edward J. Donovan.)

not asking how he justifies this, why he charged it, but assumes a conclusion that is untrue. I object to the form of the question as improper. I am not attempting to curtail it or stop it or end it, and feel they are entitled to it. I object purely to the form of the question. I think if the counsel will ask within the proper realm of cross-examination how he justifies this or that, it would be proper.

Mr. Robertson: I would prefer to formulate my questions the way I want to, and the witness has already testified that he made previous arrangements to be out of New York until Sunday night, or to be back in his office Monday morning, and he has not been able to show that he lost any business by being out of the office until Tuesday, and he cannot show that he paid Dr. Heeks anything. [169]

Mr. Allen: That is a false statement, and that is the heart of my objection to the question now before the court.

The Court: Objection sustained.

Mr. Robertson:

Q. Now, doctor, let us take the base charge you would charge for these services in New York——

A. The base charge?

Q. The charge you said you would have made had the patient been in New York. May I complete my question? You did state you would have charged between thirty-five hundred and five thousand dollars for this operation, if it had been performed in New York?

(Testimony of Edward J. Donovan.)

A. Provided certain things.

Q. What were those certain things?

A. Provided—I said provided the patient had certain attentions, had a nurse or two nurses, or had a certain kind of a room, had certain kind of attention from me—there are a good many things entering into that.

Q. I assume that what you mean to say is that had you walked in and found the conditions the same in the hospital in New York as you found at the Desert Sanatorium as to room and nurse, that you would have charged thirty-five hundred to five thousand dollars.

A. Mr. Robertson, may I ask a question about that? [170]

Q. Yes, sir.

A. I stated that the condition of the patient was one of my first considerations in fixing my fee. I have a perfect right, with this kind of questioning to suppose that this baby might have been in an entirely different condition had I seen him in New York, haven't I?

Q. No, doctor, because I said that suppose all other conditions were the same except you performed the operation in New York rather than in Tucson, which necessitated your being away from your office two days.

Mr. Allen: I refer to the record on that statement. It is not part of the original question, and I think it would be well that the colloquy between

(Testimony of Edward J. Donovan.)

the witness and counsel be limited to question and answer.

Mr. Robertson: Despite the fact I may be vigorously defending this action for my client, I am trying to extend the doctor the courtesies of one professional man to another.

The Court: It should be confined to questions and answers.

Mr. Robertson: I would suggest that the court inform Dr. Donovan that any time he has a question to ask me, he address your Honor, and then the court can ask me. [171]

Mr. Allen: That will be very satisfactory.

Mr. Robertson:

Q. Then, doctor, was it your intention to testify that you would have charged between thirty-five hundred and five thousand dollars, had the other conditions been the same, the condition of the patient, the appearance of the parents, the size of the room, the number of nurses, and everything else that went into it, except your trip from New York to Tucson and back?

A. No, sir, I had given that no consideration at all. It was not done in New York.

Mr. Robertson: If the Court please, I would like to have Mrs. Burges go back and give us the question and answer where he stated the basis upon which he determined his fee.

The Court: Is the question clear to you, doctor?

The Witness: I think this is another question, sir. I think this is another question.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. On that basis, doctor, what would your charge have been?

A. May I have the question reread, sir?

The Court: Very well. [172]

The Reporter: (Reading)

Q. Then, doctor, was it your intention to testify that you would have charged between thirty-five hundred and five thousand dollars, had the other conditions been the same, the condition of the patient, the appearance of the parents, the size of the room, the number of nurses, and everything else that went into it, except your trip from New York to Tucson and back?

A. I had not so intended.

Mr. Robertson:

Q. Very well, doctor, assuming that all circumstances, condition of the child and the financial appearance of the parents, had been the same in New York, what would your charge have been?

A. I would say about five thousand dollars.

Q. And then, doctor, after making such a charge of five thousand dollars, had you found that the appearance or appearances, as you termed them this morning, were not a true representation of the financial condition of the parties, that the nurses had been ordered on the case by the attending physician, as Dr. Thompson testified yesterday he ordered them, and that the parents had a gross annual income of eight thousand dollars, with op-

(Testimony of Edward J. Donovan.)

erating expenses during that particular year of eleven thousand dollars, would your fee have been the same? A. In New York or Tucson?

Q. In New York. [173]

A. Yes, sir.

Q. Why then, doctor, do you say you take into consideration the financial condition of the parents of the baby?

A. I do, but it is only one element. That is only one of them, and I have stated them so far as I can.

Q. You stated that where the patient or the one responsible for the payment of the fee seemed to be in comfortable circumstances, by having a large room, two nurses, working twenty-four hours a day, and the fact that there was no appearance at any time of worrying over expense, that your charge would be based upon that. Then if you find out that these people are not in comfortable circumstances, would you change your mind?

A. Of course I would change my mind, if they talked it over with me.

Q. So, had the operation been in New York, and had Mr. Jeffcott come in afterwards and made the explanation as he did in the letter he wrote you, would you have changed your mind?

A. I would be very glad to talk it over with him and do the best I could about it. I have no desire whatever to overcharge any patient, sir, and I can prove that.

Q. Suppose you talked it over with him, and he had revealed his financial circumstances, that five

(Testimony of Edward J. Donovan.)

thousand dollar charge you originally made was a charge you would have made to someone in comfortable circumstances? A. Yes, sir.

Q. The same as this twelve thousand five hundred dollar [174] charge was made?

A. Yes, I would think that, in a fair way, corresponds to a five thousand dollar charge.

Q. Yes, and then if it developed that they were a couple of young people, attempting to get started in the world, that every cent they had was in a cattle ranch that was mortgaged for a good one-third to one-half of its value, that their expenses exceeded their income by several thousand dollars, would you not reduce your bill?

A. Not if they had told me that the value of that ranch was one hundred and fifty thousand dollars.

Q. Subject to a mortgage in excess of fifty thousand dollars?

A. Yes, that is a lot of money, yes, sir.

Q. Yes, a lot of money, and twelve thousand five hundred is a big fee? A. Yes.

Q. It represents a third of your income for that year?

A. Yes, that is the only trip I ever took, six thousand miles away, in that year. Remember that, sir.

Q. The rest of the time, how did you get from your home in New Jersey to your office in New York?

(Testimony of Edward J. Donovan.)

Mr. Allen: I object to that as having no bearing on this case.

The Court: What is the purpose of the question?

Mr. Robertson: That he subjects himself to hazards and inconvenience [175] that may be equal to taking an airplane trip from New York to Tucson.

The Court: I think that is too remote. Objection sustained.

Mr. Robertson:

Q. Then you say you took into consideration the financial ability to pay? A. Yes.

Q. You know, do you not, that the majority of physicians and surgeons in this country, and particularly surgeons, have in major surgical operations been using in their determination of a fee, that principle of giving consideration to the ability of the patient to pay, one of two tests. They often take one month's salary or one-tenth of the annual net income.

A. I would not agree to that.

Q. Have you ever heard of that practice?

A. I have heard of a great many things like that, but I can't say I ever heard of that.

Q. Give us a few more. What are some of the yard-sticks?

A. It depends a good deal upon the operation. Suppose that any surgeon, a brain surgeon, a nose and throat man, or something like that, does an operation that involves a good deal of risk; or take

(Testimony of Edward J. Donovan.)

myself, if you wish me to, takes a good deal of risk in operating upon a patient who is desperately ill—lots of men of that type— [176] not necessarily that type—lots of men of that prominence, who are considered specialists, will insist upon a patient putting a fee, which is very likely to be a big fee, on the line or in the bank, before they touch that patient.

Q. How big a fee, doctor?

A. Good big ones, Mr. Robertson.

Q. In what proportion of a man's income?

A. I can name some fees, if you would like me to.

Q. I would like to ask you whether you know that it is a fact that Mayo Clinic, Johns Hopkins, Scripps Clinic at La Jolla, all operate on the basis they take ten per cent of a person's annual income, and consider in that the travel expenses of the patient from his home to the clinic?

Mr. Allen: I object to that as wholly immaterial. Dr. Donovan is not the Mayo Clinic or any other clinic. He is an eminent, highly qualified specialized surgeon, and it is immaterial what the Mayo Clinic or Johns Hopkins or Scripps charge. They are operated on a wholly different basis, and the question here is the custom or usage of surgeons who compare with Dr. Donovan.

Mr. Robertson:

I withdraw the question for a moment.

Q. Is it not a fact that you will find surgeons who possess a standing practically equal to yours, if not equal, in [177] all of those institutions?

(Testimony of Edward J. Donovan.)

A. I do not know about the Scripps.

Q. The Scripps-Howard.

A. I would certainly say that in the Mayo Clinic there are certainly surgeons that compare with anyone, even myself.

Q. Do you know about Johns Hopkins?

A. I know nothing about that.

Q. Do you know about——

A. I know who is the professor of surgery there, and that is all I know.

Q. I ask you if you do not know yourself that at least the Mayo Clinic charges fees based on the percentage of annual income I mentioned, deducting the travelling expenses of the patient from their home and return?

Mr. Allen: That constitutes improper cross-examination.

The Court: The question may be answered.

A. Mr. Robertson, with all due respect, I have a feeling that that is not true, not saying that I doubt your word, sir. I have a feeling that is not so. If you wish me to, I can develop that a little more.

Mr. Robertson:

Q. I asked you if you did not know yourself. If you do not know, your answer can be "No". [178]

A. If I do not know they do that?

Q. Yes.

A. My answer is no.

Mr. Robertson: I state to the court my information is that that fee is charged.

(Testimony of Edward J. Donovan.)

Mr. Allen: Object to the testimony of the counsel, unless he is put on the stand.

Mr. Robertson:

Q. Then, doctor, you do not have any definite way that you take into consideration the ability of the patient to pay, do you?

A. Yes, I do, Mr. Robertson.

Q. All right. Let us have it.

A. I do not mean to say that I have any plan at all, any percentage basis, or anything like that. I very frankly admit I have not, sir. My plan is that I will—I have perhaps five times in the last year, or the last two years, investigated the finances of a patient, and by that I mean that I have employed a credit bureau, for example, who will give you a report on that patient. I have not usually investigated the financial condition of patients, and by investigation I mean, gone into them very thoroughly like a report from a credit bureau. I have had no trouble in sitting down and working out [179] a price, agreeable to their finances, without me investigating their finances.

Q. You did not accomplish that in this particular case.

A. I did not have a chance to talk it over.

Q. Mr. Jeffcott did not have an opportunity to talk with you.

A. He certainly did.

Q. Could he have talked to you at the golf course?

A. Yes, I was available.

Q. Could he have talked with you while you were having dinner with the Thompsons?

(Testimony of Edward J. Donovan.)

A. He could have.

Q. You know that decent white men do not take up business matters at such times as that.

A. I think if a man is worried about something, he will talk it over any time, day or night.

Q. Let us talk about something to worry about. You said this morning, in fairness to Mr. and Mrs. Jeffcott, as the parents of the baby, is it not a fact whether or not that infant was going to survive for a number of weeks after that operation, not as a result of the operation, any neglect on your part, or anything like that, but due to the seriousness of the operation, is it not a fact that that baby's life was hanging by a hair for a considerable period of time after that operation? A. Yes.

Q. Is it not natural that any young mother and father are going to be seriously concerned over that condition? [180] A. Yes, I think so.

Q. And is it not natural, that Mr. and Mrs. Jeffcott, when they knew you were very much occupied with the other doctors, which is a natural thing for a professional man, should have refrained from forcing themselves upon you to talk about finances?

A. No, sir, I was not occupied with the other doctors, as you have stated.

Q. I do not mean by that that you closeted yourself with them, but you spent the greater part of your time with them.

A. I was available to anyone. I might have spent my time with anyone else.

(Testimony of Edward J. Donovan.)

Q. Has it occurred to you that Mr. Jeffcott might have placed utter confidence in the fact that you would, when he had explained the matter by correspondence, charge a reasonable fee?

A. No, sir.

Q. It has not occurred to you?

A. That he might arrange it?

Q. That he had utter confidence in the fact that you would be fair, and that he would have no difficulty in arranging a reasonable and satisfactory fee?

A. I am sure he had that confidence.

Q. So, was it so unusual for the boy to spend his time with his wife and worrying about his baby, rather than taking you away to talk to you about finances? [181]

A. He did not have to take me away at all to talk to me about it. He had lots of opportunities to talk with me about it, a matter of a minute, or two minutes or three minutes. No matter where I was, I was available.

Q. This statement came before the baby left the hospital? You mailed it May first, and the baby stayed in the hospital six weeks?

A. Yes, sir.

Q. Had he taken you aside and explained his finances to you, would your charge have been the same?

A. Yes, sir, in a large measure, yes, sir.

Q. Then, as I view it, at least at the time of this operation, you would walk into a private institution

(Testimony of Edward J. Donovan.)

and see a patient, and the only thing you would do in taking into consideration their ability to pay would be to consider their surroundings, their appearances, whether or not they had a nurse or a fancy bed-jacket or fancy haircut, or anything else that goes into appearances, determine upon that their financial ability to pay?

A. No, sir, not in one day. Are you speaking now of at home?

Q. Yes.

A. I would not just walk in and see what kind of a bed-jacket the patient had on. It depended upon several things. I have often determined my fee upon what the patient spent upon other things in the hospital, that means, did they have a great big room, a good room; did they stay two or three weeks; did they get out as quickly as they could; [182] did they keep their nurse all the time, when it was not necessary; did they show me during that time evidence that they were trying, or did they say to me during that time "Let's keep this down as low as we can"—any remark of that kind. Did they show me at that time they were making an effort to keep their expenses down. This is not a one day's decision. I did not say that I would walk into a room and look at a bed-jacket, or whatever you said, and say how much I would charge.

Q. But that is in a case where you are the surgeon and the one who takes care of the major part of the post-operative care?

(Testimony of Edward J. Donovan.)

A. Yes, I cannot help but see them.

Q. And the appearances of the two nurses, large room, and anything else you take into consideration, you would not take that as a snap-shot of their financial condition?

A. It made no impression upon me at all, none whatever. All I had been told previous to my coming was that expenses were no item, or whatever it was, and I merely related that I saw the nurses. Mr. Robertson, I would not mind if the Jeffcotts had ten nurses taking care of this baby. I have been called six thousand miles to see the baby. The fact they have four nurses, have the baby in a large room, those things are not going to make a bit of difference. I have been told before I came, money is no object. I had a right to charge a good fee for the job I did. The nurses, the size of the room, are minor details and [183] merely verified the fact that expenses were not worried about.

Q. Now, doctor, you have heard the testimony of Mr. Jeffcott and Dr. Thompson, of how the expression of "Money is no item" was ever conveyed to your ears. In the first instance, Dr. Thompson asked Mr. Jeffcott as to whether or not money is any object. He testifies that Mr. Jeffcott said "No". Mr. Jeffcott testified he said "Nothing in reason", and if it would not cost any more for the doctor to come out here than to take the doctor and nurse and baby back to New York, and admitting that it is very unfortunate that such a misunder-

(Testimony of Edward J. Donovan.)

standing took place, you must admit that that expression is a very elastic one.

A. It is elastic, yes.

Q. And to a person earning two or three thousand dollars a year to say "Money is no object", is one thing, but when we earn fifty thousand a year, it is entirely different.

A. No, sir, I think a man who is earning two or three thousand dollars a year cannot say "Money is no object". Money means something to anyone. I am earning more than that, and I cannot say it.

Q. Do you think that where a patient says that to you, that you are entitled to charge that patient a fee that you would charge to anyone with a very high income?

A. It means to me, I am entitled to charge a very good fee for coming out here, and it might have been, too, a [184] factor to induce me to come out here.

Q. It might have been?

A. It might have been. How do I know?

Q. Would you have refused to come out here if Dr. Thompson had told you the Jeffcotts were unable to pay you more than twenty-five hundred dollars?

A. Yes, sir, as I have stated before in my interrogatory——

Mr. Robertson: If the court please, every time I ask a question, he elaborates on it considerably and I don't think it is necessary.

(Testimony of Edward J. Donovan.)

The Court: The doctor has answered. We will take a fifteen minute recess at this time.

At 3:50 p. m., the trial was resumed.

Mr. Robertson: May we have that last question, Mrs. Burges?

The Reporter: (Reading)

Q. Would you have refused to come out here if Dr. Thompson had told you the Jeffcotts were unable to pay you more than twenty-five hundred dollars?

A. Yes, sir, as I have stated before in my interrogatory——

Mr. Robertson: I move to strike that answer, "as I have stated before". [185]

The Court: All right.

Mr. Robertson:

Q. So you do not consider, doctor, that a thousand dollars a day, plus five hundred dollars for your expenses, would have constituted reasonable compensation for you? A. No, sir.

Q. By the way, how much were your expenses?

A. Roughly three hundred to three hundred and fifty dollars. I am really not absolutely sure what the airplane cost, but it was about that, and there were no other expenses much. I had my meals at the Sanatorium and stayed at the Sanatorium. I would say my expenses were roughly three hundred, or perhaps three hundred and fifty dollars.

Q. I believe you testified this morning the condition of that baby was extremely critical?

(Testimony of Edward J. Donovan.)

A. Extremely critical?

Q. Yes, sir. A. Yes.

Q. Do you think that baby would have survived an airplane trip, doctor?

A. I could not say. I do not think it would have done a baby any good to have traveled three thousand miles by plane.

Q. When Dr. Thompson called you, if he had told you that Mr. Jeffcott could only pay you two thousand dollars, or [186] twenty-one hundred and fifty dollars, plus your expenses, after explaining the condition of the baby as he did, would you have refused to come? A. Yes, sir.

Q. What then, doctor, would have been the alternative?

A. They could have gotten some of the Tucson men to operate on the baby.

Q. Do you think someone in Tucson could have successfully performed the operation?

A. I could not say. I do not know about the people in Tucson. I have a man who could have performed an operation successfully on a baby eight days old. I do not know what the men in Tucson can do.

Q. That is exactly why you were called.

A. What?

Q. Because it was the operation for a specialist to do.

A. Yes, sir, that is a real operation.

Q. Now, doctor, you have been in the practice of medicine for yourself for how many years?

(Testimony of Edward J. Donovan.)

A. Well, I was licensed in 1921, and was practicing all of that time in the hospital. For myself, I started to practice in 1923.

Q. So in 1939 you had been practicing roughly sixteen years for yourself? A. Yes, sir.

Q. Don't you feel, doctor, that not being under the stress of worry over the health and the very critical condition [187] of your infant child, and being a professional man and being called in connection with professional services, that it was more incumbent upon you to ascertain exactly what could be paid, and what the financial circumstances of the parents were, than it was the duty of the parents of this infant child? A. No, sir.

Q. And you were perfectly willing to take that very indirect statement that the cost was no item, or expense was no item, and come out here, without asking any questions at all as to what was meant by that term?

A. I had no reason to ask what that term means. That term really means something.

Q. Hadn't your experience taught you you should inquire? A. No, sir.

Q. Now, the nature of the operation, or the condition of the baby, was explained to you in general by Dr. Thompson? A. Yes, sir.

Q. As I understand it, prior to this operation, you had performed eighteen similar operations?

A. Yes, sir.

Q. Would you say that the condition of this child was equally grave, more so, or less?

(Testimony of Edward J. Donovan.)

A. I would say that in many instances it was worse, the condition of those babies was worse.

Q. As I understand it, for those eighteen operations, you have charged nothing for fourteen? [188]

A. That is right.

Q. You charged one thousand dollars for one?

A. Yes, sir.

Q. You charged twenty-five hundred dollars for another? A. Yes, sir.

Q. Three hundred dollars for another?

A. Yes, sir.

Q. And two hundred and fifty dollars for the other?

A. I don't think I was paid for that many. As a matter of fact, there were only four that paid anything. Didn't you mention five?

Q. You have listed here, one for twenty-five hundred dollars? A. Yes, sir.

Q. One for three hundred and fifty dollars?

A. Yes, sir.

Q. And one for two hundred and fifty dollars?

A. Yes, sir.

Q. And one for one thousand dollars?

A. Yes, that is five. Twenty-five hundred, one thousand, three hundred and fifty, and two hundred and fifty. That is four. I think that is right.

Q. Now, what were the financial circumstances of the patient who paid you twenty-five hundred dollars?

Mr. Allen: Just a moment. I wish to interpose

(Testimony of Edward J. Donovan.)

another objection. It is improper cross-examination, your Honor. The law is that what a physician charges another patient is no [189] element bearing upon reasonableness of a charge in a particular case; consequently the examination is improper in this case. I want to cite a decision and read a quotation from it, your Honor. I believe that statement is in Jones on Evidence, your Honor.

The Court: Was that one of the interrogatories that was propounded and the court ruled upon?

Mr. Allen: Yes, your Honor. Interrogatories are not subject to admission in evidence. They are for discovery of counsel. There is a case or cases that hold directly that what a physician may have charged in another case is incompetent evidence as having no bearing upon the issue of the reasonableness of the charge in the case before the court. The objection that I make at this time is that what might have been charged in other cases, or the elements going into those cases, are all immaterial as to the determination of the case. The issue before the court is what is the reasonable value of the services performed, and what might have been the reasonable value of some other service does not tend to prove or disprove that issue. The court can readily see that, and the cases are multitudinous along that line, such as the case of *In Re Walkers Estate*—— [190]

The Court: I sustain the objection.

Mr. Robertson: If the Court please, it is the best

(Testimony of Edward J. Donovan.)

yard-stick in the world in determining what this man charges for his services. I am confident that if there is such a decision as Mr. Allen speaks of that it is the old line of argument that any testimony of the doctor or patient is inadmissible, but the courts, even in Missouri, have gone so far as to allow the admission of the testimony of the doctor as to what he charged in other cases.

Mr. Allen: Your Honor, I cite 21 Ruling Case Law, p. 45; 48 C. J., p. 1166, and *Citron v. Fields*. As to the reasonable value of services, the court held that other acts of service throw no light upon that. What the doctor might do in other cases might have a bearing upon his reputation, but the amount of fees in other cases is an improper measure. It throws no light upon the issues in this case. They cannot be related to it. They throw no light on it. They are merely isolated instances and do not constitute a practice which has any bearing upon this particular case. They are under different circumstances. If the counsel could prove an identical case, it might have some bearing, but they are not permitted to examine at random about other cases. [191]

The Court: Your inquiry is what were the financial circumstances of the party against whom the doctor made a charge in that particular case?

Mr. Robertson: Yes, sir.

The Court: I sustain the objection.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Doctor, what were the circumstances, including all of the elements which you took into consideration in making a charge in connection with the fee of twenty-five hundred dollars, which you received from a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. What were the same conditions and circumstances, doctor, under which you received a fee of one thousand dollars for a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling. [192]

Mr. Robertson:

Q. And what were the circumstances and conditions under which you received a fee of three hundred dollars for performing a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. What were the conditions and circumstances under which you received a fee of two hundred and fifty dollars?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. Why is it, doctor, there is so much variance in the charges you make?

Mr. Allen: Same objection.

The Court: Same ruling. [193]

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. I will ask you, doctor, if the fact that on one occasion, or rather on fourteen occasions, you made no charge, on one occasion you charged one thousand dollars, on another occasion you charged twenty-five hundred dollars, another occasion two hundred and fifty dollars, and another occasion three hundred and fifty dollars, does not clearly indicate that the financial condition of the parties is not one of the very important and controlling considerations, or factors you take into consideration, in fixing a fee?

Mr. Allen: Same objection, and I move that the question and answer as to the amount of charge be stricken from the record.

The Court: That came in without objection.

Mr. Allen: And the same objection to this line of examination.

The Court: Your objection will be sustained.

Mr. Robertson:

Q. When did you first ascertain that Mr. Jeffcott's father was a very wealthy man?

A. I do not know, Mr. Robertson that I ever ascertained that. I did not know anything about the name "Jeffcott", [194] or anything at all like that.

Q. When did you first find out that he was supposed to be a man of considerable means? Was it before or after you sent that statement?

A. I could not say, sir.

Q. Is it not a fact, doctor that you knew it before you ever sent that statement on May 1, 1939?

(Testimony of Edward J. Donovan.)

A. Not necessarily, no, sir. I cannot answer that.

Q. It might have been?

A. It might have been and might not have been.

Q. Is it not a fact, doctor, that this statement and this charge you make—that the charge was made and the statement was sent with the hope or expectation that the grandfather would take care of the bill?

A. No, sir. No, sir, positively not.

Q. How much would it have been, doctor, if Mr. Jeffcott, Sr., was paying the bill?

A. How much would it have been?

Q. Yes.

A. It would have been the same.

Q. Therefore, you make no difference at all as to the financial condition of the people?

A. No, sir, that is not what I said at all. This specific case, when a man asked me to travel six thousand miles to operate upon a baby eight days old, I think I am reasonable in assuming that he is able to pay, and that I have a right to charge what I consider a reasonable fee [195] for that service under those circumstances.

Q. Is it your conception of the law, doctor, that what you decide to charge is absolutely binding upon everyone?

Mr. Allen: I object to that.

The Court: Objection sustained.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Once you have made up your mind, don't you ever change it?

Mr. Allen: Object to that as too general and argumentative.

Mr. Robertson:

I withdraw the question.

Q. Once you have billed a patient, do you consider that act final, from which you never recede? As a matter of fact, you did agree at one time, to take seventy-five hundred dollars for this fee?

A. I did, sir, I did.

Q. And that was because of the explanation of the financial circumstances of Mr. Jeffcott?

A. No, sir, it was not.

Q. And at that time, Dr. Hamblin, to whom you have referred, went to see you about this fee, and offered you one thousand dollars, plus expenses?

A. Not plus expenses. He knew I had spent about three hun- [196] dred dollars out here and back. He offered me one thousand dollars, and he never said, to my knowledge, that that even included expenses for coming here.

Q. Suppose he had said expenses, would you have settled?

A. For a thousand dollars?

Q. Yes. A. No, sir.

Q. Five hundred dollars a day is not such bad pay for you, is it doctor?

A. I don't work by the day.

Mr. Allen: I object to that.

(Testimony of Edward J. Donovan.)

The Court: Objection sustained.

Mr. Robertson: May I be heard. I know you have ruled. The doctor was required in the interrogatories to answer as to his daily earnings. He did not do so.

Mr. Allen: I object to that. I resent counsel interposing into this record matters not in evidence and not properly to be put in evidence, and I object to any discussion about the daily earnings of the doctor, on the very good authority that they are no element in this case, and I can cite authorities to that effect. [197]

Mr. Robertson: May I suggest that——

Mr. Allen: I do not think you could get a better citation than 48 Corpus Juris, page 1166, and the next two or three pages subsequent thereto, and the cases cited therein.

The Court: Does that hold that evidence of the daily earnings of the doctor are admissible?

Mr. Allen: 1917 LRA, 1271: "Daily income may not be considered" is the statement of those authorities.

Mr. Robertson: Once again I think it is evident from the antiquity of these citations that it relates to times when the evidence of doctors' earnings, or the earnings of the patient, were not admissible. Will you read the question?

The Reporter: (Reading)

Q. Five hundred dollars a day is not such bad pay for you, is it, doctor?

(Testimony of Edward J. Donovan.)

A. I don't work by the day.

Mr. Robertson: That is the question you made objection to and the court sustained it. All right. [198]

Mr. Allen: May I move the partial answer be stricken?

The Court: Yes.

Mr. Robertson:

Q. But at any rate, doctor, your gross annual earnings for the year 1939, including the twenty-five hundred dollars you were paid by Mr. Jeffcott, were forty-thousand, eight hundred and eighty-seven dollars and five cents?

Mr. Allen: Object to that as immaterial.

The Court: The testimony is already in, I believe.

Mr. Allen: I believe that is correct. I apologize, your Honor.

Mr. Robertson:

Q. What were your net earnings doctor, from your profession?

Mr. Allen: Object to that as immaterial. It can have no earthly bearing upon the charge made by the doctor in this case.

The Court: The witness may answer the question. [199]

The Reporter: (Reading)

Q. What were your net earnings, doctor, from your profession?

Mr. Allen: I assume that is for the year 1939.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. For the year 1939.

The Court: That is from the doctor's practice?

Mr. Robertson: From his practice only.

A. I can furnish that specifically, if you want me to.

Mr. Robertson:

Q. Not in exact dollars and cents, doctor. If you can, give it to me merely as a rough estimate.

A. I would say about thirty thousand dollars.

Q. About thirty thousand dollars?

A. Yes.

Q. How many fees of over twenty-five hundred dollars did you charge in 1939?

Mr. Allen: That is objected to as immaterial, and not proper cross-examination.

The Court: Well, the doctor may answer the question. [200]

A. I can say two offhand.

Mr. Robertson:

Q. Was this fee one of them?

A. Was this fee? What did you say?

Q. I said in excess of twenty-five hundred dollars? A. No, sir.

Q. In other words, you made three charges in excess of twenty-five hundred dollars in 1939?

A. I see what you mean now. I did not understand that specifically. By charges, you mean the entire bill, and I did not understand it that way.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

I withdraw the question and shall straighten it out.

Q. How many fees in excess of twenty-five hundred dollars did you charge in 1939 for the performance of a surgical operation?

Mr. Allen: I make the same objection.

The Court: The doctor may answer the question.

A. I cannot say exactly, but I can say this: That I know of a fee of five thousand dollars, and I know of a fee of thirty-five hundred dollars, and further than that I cannot say without my records. [201]

Mr. Robertson:

Q. Were those fees paid, doctor?

A. Yes, sir.

Mr. Allen: I object to that as immaterial, and move to strike the answer.

Mr. Robertson:

Q. Will you state the nature of the operation and the financial circumstances of the parties.

Mr. Allen: I make the same objection as heretofore made to this line of questioning.

The Court: I make the same ruling.

Mr. Robertson:

Q. Doctor, judging from your testimony of your credentials, you no doubt are considered the leading or one of the leading baby specialists in the city of New York, and I will ask you if it is not true that included among your patients, mostly for that reason, are the more wealthy people in the city of New York?

A. No, sir.

(Testimony of Edward J. Donovan.)

Q. Is it not a natural thing, doctor, for those who can afford the best to get the best?

A. It may seem so, but I have many patients who are very poor. [202]

Q. But is it not a fact that you get more of the wealthy patients who are in need of your services?

A. No, sir, there is pediatric surgery done in every hospital in New York probably.

Q. And these men whom I am going to name are first class surgeons. Dr. Heeks?

Mr. Allen: That is objected to as immaterial, your Honor. Dr. Heeks has no bearing on this case.

The Court: Perhaps not, but you may answer the question.

A. Dr. Heeks is a very much younger man than I am, and has had very much less experience than I have. He is a very good doctor, but is not outstanding in that field.

Mr. Robertson:

Q. Dr. Soli?

Mr. Allen: Same objection.

The Court: I don't know but what it will be material.

Mr. Allen: May I reserve my objection to the entire line?

The Court: Very well. [203]

Mr. Robertson: I avow that these doctors whom I am now naming are in the depositions taken by the plaintiff as being outstanding surgeons in this particular line of work in New York City.

(Testimony of Edward J. Donovan.)

Mr. Allen: The avowal does not aid the situation. There is no issue regarding those men. Their qualifications are not in issue at the present time here.

The Court: You are attempting to establish by this witness the standing and professional experience of some physician whose deposition is here?

Mr. Robertson: I am attempting to show that notwithstanding the fact although Dr. Donovan is perhaps better known than many other surgeons who specialize in this particular line, that there are many others in the country who are equally competent, and then I am going to tie that into another phase of the case.

Mr. Allen: I make that objection.

The Court: There is another reason—not proper cross-examination. [204]

Mr. Allen: I thought I made that objection.

The Court: The objection is sustained.

Mr. Allen: May my objection be preserved as to all of these anticipated questions at this time?

The Court: Very well.

Mr. Robertson:

Q. I will ask you if it is not true that the following doctors are considered to be high-class specialists in the line of baby surgery in the vicinity of New York City: Heeks, Solley, Touroff, Farr, Peterson, and Dr. Sullivan.

Mr. Allen: You are not to make any answer.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. I ask you also if Dr. Ladd, of Boston, is not considered to be equal to you in the line of surgery in which you specialize?

Mr. Allen: I stipulate that. I have no objection to that. If it is of any value, I will so stipulate. [205]

Mr. Robertson:

Q. Now, doctor, this intestinal blockage is not a condition that is peculiar to New York City, is it?

A. Intestinal obstruction?

Q. Yes. A. No, sir.

Q. It happens all over the United States, and all over the world?

A. I suppose it does. I do not see why it should not.

Q. And in some way, the patients not in New York City are operated and a good percentage of them survive?

A. No, sir, lots of those conditions are discovered on the death table, lots of them.

Q. Of course, doctor, you have had some bad luck yourself, haven't you? A. Yes.

Q. You don't happen to know any doctors other than in New York who do this work, do you?

A. The first report of this work came from London in 1923, perhaps somewhere along in there. I know other men who would be capable of doing that type of work.

Q. In fact, there are many, many surgeons all over the country?

A. Who are capable of doing that?

(Testimony of Edward J. Donovan.)

Q. Yes. A. I would not say so, sir.

Q. But there are certainly those I have named and no doubt others? [206]

Mr. Allen: I object to that as assuming something which has been denied here. It is an improper question.

Mr. Robertson:

I shall reframe the question.

Q. I will ask you whether or not any doctors out in the western part of the United States, or away from New York, are capable of performing an operation such as the one in question here.

A. I would say Dr. Ladd from Boston and Dr. Morton from Rochester, New York. I mention them immediately because they stand out in my mind.

Q. But you are not acquainted with any doctors in the west or closer to Tucson than New York City who could do it?

A. I would not want to say I am not acquainted with them, but I would not want to qualify for their work, which is a part of the question asked. I may have met them. I do not know them sir.

Q. No discussion was had between you and Dr. Thompson as to whether or not any other doctor who might live closer was available?

A. No, sir, it was not.

Q. You did not suggest to him he might be able to get someone closer?

Mr. Allen: Object to that. [208]

The Court: Anything pertaining to the conver-

(Testimony of Edward J. Donovan.)

sation between this doctor and Dr. Thompson is admissible.

A. If I recommended such a——

The Court: Read the question.

The Reporter: (Reading)

Q. You did not suggest to him he might be able to get someone closer?

A. I did not suggest it, no, sir.

Mr. Robertson:

Q. Dr. Donovan, at any time while you were at the hospital here, did you ever speak to Dr. Thompson about arranging a conference with Mr. Jeffcott to discuss the matter of your fee? A. No, sir.

Q. You never indicated in any way a desire on your part to have the matter settled before you went back to New York? A. None whatever.

Q. Do you know whether or not Dr. Thompson or Dr. Carrell told Mr. and Mrs. Jeffcott that you did not intend to leave the city until the sleeper plane Monday evening?

A. I did not, no, sir.

Q. And if that was the case, doctor, doesn't it seem reas- [209] onable that Mr. Jeffcott intended to see you Monday afternoon when he came back from the ranch?

Mr. Allen: Object to that, to the form of the question.

The Court: Objection sustained.

Mr. Robertson:

Q. I believe you stated that you could not say whether or not Mrs. Jeffcott told you that her hus-

(Testimony of Edward J. Donovan.)

band had wanted to see you before you left when you came in to see her just before you left?

A. That he had wanted to see me?

Q. Yes, just before you left for the plane.

A. I don't remember any such statement.

Q. You would not say that she did not make such a statement, would you?

A. I would not say one way or the other.

Mr. Robertson: If your Honor please, may I interrupt the examination? I have just indicated to Mr. Allen my intention to make a motion for continuance of the case, as I indicated to the court at the time I made a motion for continuance prior to the beginning of the testimony, at the conclusion of Dr. Donovan's testimony, and I have suggested to Mr. Allen that I might cut short my examination and be willing [210] to carry through as long as possible, if Dr. Donovan plans to get away tomorrow, if the continuance is granted. My reason for asking the continuance is that we have a case definitely set for trial on Tuesday, and we have under subpoena over thirty witnesses, most of whom are old Mexican people, and it is going to necessitate my scouring over Santa Cruz County and the southern part of Pima County, in order to get started on Tuesday morning. Certainly no hardship can be worked upon anyone in this case, as Dr. Donovan's testimony will be before the court and the depositions can be taken care of at some time convenient, and Mr. and Mrs.

(Testimony of Edward J. Donovan.)

Jeffcott and the doctors I intend to use on the question of the reasonableness of the fee can be taken up at some time after the other case is disposed of. It was more or less my impression that the court would kindly receive my motion for continuance. You did not bind yourself to grant the motion in any sense, but I was in hopes you would grant my motion.

Mr. Allen: May it please the court. That brings up another embarrassing situation, as any of these matters between counsel are, but I am forced to oppose such motion on a number of grounds. In the first place, it is predicated only upon the convenience of counsel, and as much as I dislike to stand here and say so, I am forced to say [211] that that is no ground for the continuance of a case. Secondly, it was my understanding that this case would be completed. I agreed that I would do anything within my power to complete the presentation of the case, but it is not agreeable to me, and it would not be agreeable to the plaintiff—I know it is not agreeable to him—that testimony on the issue of fees be presented in his absence. As a matter of reservation of ruling upon objections or the postponement of the argument of the case, or anything of that sort, I certainly would not be heard to oppose it, but this is basic and fundamental. There are experts to come here, or those who seek to qualify as experts. This is a surgical case, if the whim might strike one to so designate it, and I think it is vital to this

(Testimony of Edward J. Donovan.)

plaintiff's right that he be permitted to confront those witnesses and be present during their testimony. There is no justification that he be asked to return to New York and make a second trip out here, at an expense of seven hundred fifty to one thousand dollars to meet someone's convenience.

The Court: I gather that your case in Superior Court starts Friday, the fifth?

Mr. Robertson: No, sir, it starts next Tuesday, and is a case that will last two or three weeks, and I don't want to differ [212] with counsel but it was definitely understood that we would start to trial, let him produce his testimony, and then at the conclusion, if I chose I might make a motion for continuance, and Mr. Allen's attitude at that time—I won't say that he agreed to it.

The Court: The court did not understand that the case would go to trial and then the taking of testimony would be interrupted. I did not understand that to be the case.

Mr. Robertson: It was even discussed that we might even postpone the depositions in the plaintiff's case until after this other case had been disposed of.

Mr. Allen: That is all right. You may argue the admissibility of the depositions at any time. I thought we might be able to finish this case, or at least all portions of it in which Dr. Donovan's presence is necessary.

Mr. Robertson: It won't be possible, because I will have at least four medical witnesses on the

(Testimony of Edward J. Donovan.)

reasonableness of this fee, and I can assure you there will be nothing brought in here concerning negligence or impropriety in the manner in which the operation was performed, and Dr. Donovan need not anticipate any such thing as that will be brought [213] in court.

The Court: I would not feel disposed to interrupt the orderly procedure of this case. At the completion of the submission of testimony, if counsel desire, instead of arguing the case at that time, to have an extension of time for briefing the case, the court would allow that, but I do not feel that the situation warrants the court in disrupting the case right in the midst of the taking of testimony.

Mr. Robertson: That certainly was not the understanding created in my mind at the time you overruled my motion for continuance.

The Court: Well, do you want to take advantage now of the twenty minutes before the recess hour?

Mr. Allen: Plaintiff would like very much to.

Mr. Robertson: Is it the court's ruling, or will the court state that when I make my motion for continuance it will be denied?

The Court: There is nothing before the court now to authorize the court to interrupt the orderly procedure of taking tes- [214] timony in the case. The main witness is here. We shall have to proceed on through the taking of the testimony in the case, and then, after the case is submitted, if indulgence is desired at that time, the court may entertain a

(Testimony of Edward J. Donovan.)

motion to that effect. That is the situation. In fairness to everybody, these depositions will have to be read by the plaintiff in presenting his case. So if it takes from now to the end of next week, we shall go ahead with the presentation of the case.

Mr. Allen: That is what I am asking for, is to finish the case.

The Court: Very well.

Mr. Robertson:

Q. How many fecal fistulas, doctor, have resulted from the eighteen operations you have performed upon infants in this nature of case?

A. How many fecal fistulas have resulted from the operations I have performed?

Q. Yes, how many have you had?

A. Three existed at the time they were operated upon. Three were present at the time they were operated upon.

Q. How many have come into being where they did not exist at the time of the operation?

A. None.

Q. Except the Jeffcott baby? [215]

A. Yes, sir.

Q. And you were relieved of the responsibility of at least the menial task of taking care of the post-operative attention to this child?

A. I was relieved of that?

Q. Yes.

A. The menial task? Yes, sir.

Q. Had the operation been performed in New

(Testimony of Edward J. Donovan.)

York that would have been a part of your operative duty? A. Yes, sir.

Q. It would have necessitated your seeing the child each day for a number of days, wouldn't it?

A. Yes.

Q. Did you perform the post-operative work in each of the other eighteen operations?

A. Post-operative care of the patients?

Q. Yes. A. Yes, sir.

Q. And was that figured in as a part of the fee or the charge you made in each of those cases?

A. Yes, sir. It does not amount to much.

Q. It does not amount to much? A. No.

Q. It is something you might have to be doing when you could be in your office or doing some other operative work?

A. No, sir, that is not so.

Q. You make no charge for anything, then, other than the [216] operation itself?

A. That includes a good many things. You do not make a specific charge for this, that or the other thing. A fee will include an office visit or two or three or four, a consultation after the operation, several things like that, and post-operative care of the patient perhaps.

Q. And didn't the fact that you did not have to do the post operative care of this patient enter into the charge you made? A. No, sir.

Q. You charge no more and no less because of that? A. No, sir.

(Testimony of Edward J. Donovan.)

Q. Did you take into consideration, doctor, the realization of the expense that Mr. and Mrs. Jeffcott were required to incur in connection with the charges of the doctors here, Dr. Carrell, Dr. Tappan and Dr. Thompson, the hospital, and the expenses of the nurses?

A. No, sir, that was not my concern at all.

Q. And the fact that they may have incurred some three thousand additional expense did not enter into your consideration at all? A. No, sir.

Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing they were spending that much money. Is that true?

A. May I have that repeated? [217]

The Reporter: (Reading)

Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing they were spending that much money. Is that true?

A. No, sir, it had no effect whatever on my fee. My fee was special for operating on a baby six thousand miles away.

Q. Six thousand miles away from where?

A. Six thousand miles away from me—Well, three thousand miles away from me—and saving the baby's life, traveling six thousand miles to do it—special.

Q. You would not have done it for twenty-five hundred dollars? A. I would not.

(Testimony of Edward J. Donovan.)

Mr. Allen: Objected to as having been asked and answered.

The Court: The question and answer may stand. It is repetition.

Mr. Robertson: That is all. [218]

Re-Direct Examination

By Mr. Allen:

Q. You were asked on cross-examination how much time was required to reply to and advise Dr. Thompson relative to the post-operative progress of this case, and I believe you replied that little time was required. How much skill was required in order that a surgeon might give valuable advice under those circumstances?

A. Under those circumstances, I would say considerable. I shall have to say it that way. How can you measure skill otherwise?

Q. Will you state whether or not you were subject to call while you were at Atlantic City, at or about the time of the employment negotiations on this case? A. Yes, sir.

Q. Were you or were you not?

A. I was on call.

Q. I will ask you whether or not you were subject to call here at Tucson, Arizona, while you played a game of golf with Dr. Carrell on the afternoon of the operation?

A. Do you mean by "subject to call" could I have been called?

(Testimony of Edward J. Donovan.)

Q. Yes, were your whereabouts known so you could be called?

A. I think everyone knew I was playing golf with Dr. Carrell.

Q. You mean everyone at the Desert Sanatorium? A. Yes, I thought so.

Q. What was the situation while you were having dinner [219] that evening?

A. I don't remember too much about that dinner. There probably was a telephone there. I really do not know much about that dinner.

Q. What were the indications, Dr. Donovan, following the operation, as to the probability of there being any need of your presence throughout the afternoon? A. Nothing.

Q. What was the situation in that regard when you examined the patient during the latter part of the afternoon, in reference to your evening of absence?

A. I was very pleased with the baby's condition.

Q. Now, Dr. Donovan, why would you have refused to come to *come to* Tucson, Arizona on this particular case for a fee of twenty-five hundred dollars?

A. My responsibility to my own family, a responsibility to my patients, my practice. I would not take that risk for a fee that I can get just as easily in New York.

The Court: A little louder, doctor.

A. I would not come to Tucson, Arizona, for

(Testimony of Edward J. Donovan.)

that fee because I feel that I have a very definite responsibility to my family, my own family, and to my patients and to my other patients I may have in the hospital at that time, and I would see no point in my running a risk like that when I can get the very same kind of fee at home. [220]

Mr. Robertson: I object to that last statement and move it be stricken. There is no evidence of it, and no justification for the remark being made.

Mr. Allen: I have no objection. It may be stricken.

Q. Dr. Donovan, will you state how many times during the course of your practice you have refused to see or operate upon any patient within the territorial limits of your practice in New York, or in the vicinity of New York?

Mr. Robertson: I object to that as entirely incompetent and immaterial, because the patient's circumstances and conditions as to whether he did or did not cannot be brought forth in this court. It is more improper than any question I asked him about other fees, because that was a definite transaction.

Mr. Allen: They went into the refusal to come out here and raised an insinuation that there is some duty on the part of the doctor to go anywhere in the world to perform an operation, and I want to bring out the facts and circumstances that enter into it. It is permissible because of the attempted cross-examination on his assumed refusal to come here. [221]

(Testimony of Edward J. Donovan.)

The Court: I will recess now until ten o'clock tomorrow morning, and then I shall hear you on your objection. I will say to counsel now that tomorrow is a holiday, but if it will help the counsel, we will work through until one o'clock.

Mr. Robertson: That does not help my situation at all, so whatever the court desires to do is all right with me.

On Friday, January 31, 1942, at the hour of ten o'clock in the forenoon, the trial of the case was resumed, with the same appearances as heretofore.

Mr. Allen:

May it please the Court. In opposing counsel's motion for continuance yesterday afternoon, I did not in any wise wish to oppose any move which might shorten the progress of this trial to a point at which recess might reasonably be taken. This is a suggestion I should have made yesterday afternoon possibly, but being a little weary, it did not dawn on me until we had left the court house, but I am perfectly agreeable, on behalf of plaintiff, to stipulate that the order of presentation, the usual order, may be interrupted in this matter, in that, if counsel for defendants desires, that plaintiff will withhold the presentation of his testimony by deposition [222] and reserve the privilege to put that on after defendants' case in chief, and permit the defense to proceed at once, or as soon as the plaintiff rests other than for that testimony, which should be in a very short time, to put on its wit-

nesses, and then the question of depositions can be taken up at some later convenient time. That will be wholly agreeable. In that way, it occurred to me that counsel might well get released from the presentation of this case in time to proceed with the case which comes to trial on Tuesday.

Mr. Robertson: The only thing I have to say is that I have several medical witnesses as to the reasonableness of the fee, as I mentioned yesterday. I also will have to put on Mr. Jeffcott and Mrs. Jeffcott. Their testimony will take at least a day, or more, so it really would not facilitate the matter at all. My plans at the presnt time are to go right ahead, and I have made arrangements with my doctors to be here on Monday, if your Honor goes on with the trial on Monday. I do not have my doctors available now, and am quite sure I would not be able to get them and discuss the matter with them any time today, because I had to make my plans in accordance with the understanding we had yesterday afternoon.

The Court: Mr. Allen, you are ready now for the matter of offering [223] the depositions?

Mr. Allen: Other than some very brief examination of the palintiff. I regret I did not have the presence of mind to make that suggestion yesterday afternoon, but I thought it better to make it this morning than never, if there was anything in it of advantage to counsel for defendants.

Mr. Robertson: If I had known that yesterday afternoon, I would have been able to work with my

experts last evening and be ready this morning, but I did not, and I am not prepared to put them on.

The Court: The counsel understands that this is Saturday and we recess for the afternoon?

Mr. Robertson: Yes.

DR. EDWARD J. DONOVAN,

a witness in his own behalf, resumed the stand for further re-direct examination.

Mr. Allen: Will you please read the last question.

The Reporter: (Reading) [224]

Q. Dr. Donovan, will you state how many times during the course of your practice you have refused to see or operate upon any patient within the territorial limits of your practice in New York, or in the vicinity of New York?

Mr. Robertson: I objected to that as immaterial.

The Court: Objection overruled.

Mr. Allen: You may answer, doctor.

A. Never to my knowledge.

Q. Dr. Donovan, assuming that you had been called upon to come to Tucson to operate upon the Jeffcott baby, but that the nature of the condition was such that you could have made the trip by rail, and had made the trip to Tucson by rail, and had performed the operation upon arrival, as you did, under the circumstances which did prevail in the fee under those circumstances?

matter, what would have been the amount of your

(Testimony of Edward J. Donovan.)

A. You mean with the conditions precisely as they were in regard to risk, and so forth, with the baby?

Q. Yes, except that the trip was by rail.

A. It would have been fundamentally the same. I would have had to be away from my office longer.

Q. There would have been no substantial difference in the [225] amount of your charge?

A. No, sir.

Mr. Allen: Now, if it please the Court, I have no further examination of this witness on redirect, but I have given some further thought to the objection that was interposed in the course of cross-examination yesterday afternoon. The court will recall that the witness was questioned relative to some fees of lesser amounts for similar operations performed at New York. No objection was interposed to that, on the theory that it was probably proper to permit counsel to inquire into the fact that the operation had been performed in other cases for a lesser amount. I objected to the further examination as to the details surrounding those operations.

The Court: An objection was sustained to the examination as to the financial condition of those other patients.

Mr. Allen: The objection was predicated upon the law would not permit the plaintiff to show what he had charged in this case, related to what he had charged in previous cases. It occurs to me

(Testimony of Edward J. Donovan.)

that there might be a possibility that the evidence should be admitted as to the amount of those lesser charges, under the theory of cross-exami- [226] nation that a party is entitled to explore those matters that develop in the course of cross-examination.

The Court: Do you want to withdraw your objection?

Mr. Allen: I am willing to withdraw the objection for the sake of guarding against any possible error in the record of the case. I withdraw the objection, and agree that the counsel, on taking the witness for re-cross at this time, may examine him on that point, if he so desires.

Mr. Robertson: I object to counsel's suggestion that his objection be withdrawn. The objection was made in the orderly course of my examination, it was argued, and the court ruled. You will appreciate it is difficult for me to go back and unearth all the questions and revamp my cross-examination. If any error was committed by counsel, I am afraid he will have to take the consequences.

Mr. Allen: That is all right.

The Court: Now, Mr. Robertson, you may have the advantage or disadvantage of it. There is an offer here to cross-examine, and if circumstances do not warrant your taking advantage [227] of that offer——

Mr. Robertson: I want the record definitely to show that I am not consenting to his withdrawing

(Testimony of Edward J. Donovan.)

the objection, and I am objectng at this time to his coming along and withdrawing his objection, because the record was made, and the weight of it will have to be borne by counsel for plaintiff.

Re-Cross Examination

By Mr. Robertson:

Q. So, doctor, if you had come to Tucson by rail, I believe you said, the hazard of air travel would be offset by the additional time you would have to take on the train?

A. I did not say that. I did not say anything about the hazards. I said my charge would be precisely the same, because, as I stated yesterday, the charge was made for travelling six thousand miles and saving the life of a baby. How you come makes very little difference.

Q. Is it not a fact that in figuring up your bill, you put in five thousand dollars for the hazards of that trip by air?

A. That is not true, sir.

Mr. Robertson: I rely on the record, if the court please.

A. I never made such a statement. [228]

Mr. Robertson:

Q. Doctor, I still am unable to see how you take into consideration the financial condition of the patient, as you say you do. Your testimony was that this charge of twelve thousand five hundred dollars was a charge you would have made to anyone who could afford to pay that fee. Yet you testified

(Testimony of Edward J. Donovan.)

that after you found out the limited income of Mr. Jeffcott, that your fee would have been the same. Now, will you explain to me how you take into consideration the financial condition of a patient, even if your first impression of your patient's wealth is subsequently shown to be erroneous.

Mr. Allen: I object, your Honor, as that is not proper within the re-cross-examination, not being a matter touched upon on the re-direct examination. Counsel released the witness after about half a day of detailed cross-examination.

Mr. Robertson: If the Court please, Mr. Allen reopened this line of inquiry by attempting to have the doctor show that actually five thousand dollars of that fee was not because of the hazards of the flight, as he definitely testified to yesterday, and the answer he just gave to my question was that those elements did not enter into it, and so I think once again that line of testimony has been opened up. [229]

The Court: The doctor may answer the question.

A. I do not see why, in considering Mr. Jeffcott's finances, I should be limited to Mr. Jeffcott's income. Some of the clinics you mentioned yesterday, in considering a person's condition, know his net worth, every security he holds, and everything that man owns, and they know it before they name any fee. I do not see why because Mr. Jeffcott's income happens to be whatever it was, five thousand

(Testimony of Edward J. Donovan.)

dollars, that my fee should be changed because of that. It is not my fault. The job I did for Mr. Jeffcott was worth so much. Mr. Jeffcott called me here to do it, and stated before I came that expense was not of any value here. If that is not true, the whole thing has been misrepresented to me. If Mr. Jeffcott's income was that, I do not think I should have been told that expense was no item.

Mr. Robertson:

Q. Where did you get all this information about these various clinics?

A. I said some of the clinics.

Q. When did you get the information? Yesterday you did not have any.

A. No, I did not say that.

Mr. Allen: I object—no such testimony involved here. [230]

Mr. Robertson: It was in the record.

Mr. Allen: The objection was sustained yesterday.

Mr. Robertson:

Q. When did you get the information?

A. I have known that for years, and so has everyone else.

Q. And you also know the clinics I mentioned to you yesterday base their charges on the net income of the patient?

(Testimony of Edward J. Donovan.)

Mr. Allen: I renew the objection that that is improper cross-examination, and also improper on re-cross.

The Court: The doctor may answer the question.

The Reporter: (Reading)

Q. And you also know the clinics I mentioned to you yesterday base their charges on the net income of the patient? A. I do not.

Mr. Robertson:

Q. What do you know about the cattle business, doctor?

Mr. Allen: Objected to as improper cross-examination and improper re-cross-examination. [231]

Mr. Robertson: He has just delivered another dissertation. Every time I ask a question, *me* makes a speech, and has just delivered a long speech about Mr. Jeffcott's holdings and net worth. Now, if he does not know it, I should like the plaintiff to be informed about the cattle business, and what Mr. Jeffcott's holding would amount to.

The Court: Objection sustained.

Mr. Robertson: That is all.

Mr. Allen: That is all, doctor. Now at this time, if your Honor please. I would like to introduce in evidence the testimony of William A. Downes, Carl G. Burdick and Fenwick Beekman, as the same appears within depositions taken in the state of New York, before Albert Gerber, a notary public.

Mr. Robertson: I object to the offer, if the court please, on the ground that the testimony of experts in New York constitutes no measurement of the value of the services rendered by Dr. Donovan in Tucson, and of course I shall reserve other objections as the depositions are read into the [232] record.

The Court: You have made objections to other testimony on that ground and the court has overruled them.

Mr. Allen: What procedure does the court desire followed with reference to the reading of these into the record? Shall I do the complete reading?

The Court: The usual practice has been for one counsel to read the questions and another counsel the answers.

Mr. Allen: I have no other counsel whom I can use, but I can use the plaintiff, if necessary.

Mr. Robertson: I have no objection.

Mr. Allen: I will indicate each time the question and answer.

Mr. Robertson: I may be able to help Mr. Allen out by reading the answers.

Mr. Allen: I would appreciate it very much if you are agreeable to do that. [233]

DEPOSITION OF WILLIAM A. DOWNES

Direct Examination

By Mr. Schmidt:

Q. 1. Dr. Downes, what is your name?

A. William A. Downes.

Q. 2. You reside at Balmsville, Newburgh, New York?

A. Yes. Balmsville is a part of Newburgh.

Q. 3. Before you retired, what was your profession or occupation, doctor? A. Surgeon.

Q. 4. When and where were you admitted to practice as a physician and surgeon, doctor?

A. 1895. New York.

Q. 5. Omitting your preliminary education such as college, and so forth, in what schools did you attend in preparing for the practice of surgery and medicine?

A. College of Physicians and Surgeons, Columbia University.

Q. 6. How long were you in attendance at such school, doctor? A. Three years.

Q. 7. What degree, if any, did you receive from such school, doctor? A. Doctor of Medicine.

Q. 8. Do you recall what year your degree was conferred upon you? A. 1895. June 10.

Q. 9. Did you have any other and special training which was designed to fit and prepare you for the practice of [234] such profession?

A. I served an internship at the New York Cancer Hospital sixteen months, and at the New York Hospital eighteen months.

(Deposition of William A. Downes.)

Q. 10. Did you practice surgery and medicine from that date—until when?

A. Surgery. I never practiced medicine. I practiced surgery from 1895 to 1927.

Q. 11. And you retired in 1927, doctor?

A. Yes.

Q. 12. During that time, or now, are you a member of any professional organizations in which admission to membership is dependent upon the demonstration of special professional qualifications or accomplishments?

A. The New York County Medical Society; the American Medical Association; the American Surgical Association; the New York Surgical Society; the Southern Surgical Society. Practically all smaller societies.

Q. 13. What special professional qualifications or accomplishments were requisite to membership in each of those organizations to which you belonged, doctor?

A. Surgery was the outstanding thing in each of them.

Q. 14. Were they honorary organizations, doctor? A. What do you mean by that?

Q. 15. I mean they were organizations in which only persons of outstanding ability in surgery were qualified to join? [235]

A. They were special societies like surgical societies, yes: the American Medical Association, any department of medicine entitles you to be a member.

(Deposition of William A. Downes.)

Q. 16. Will you state as fully as you can the nature and extent of your past experience in the practice of your professional of surgery.

A. I specialized in surgery when I first started practicing, which was in 1899. All of my hospital appointments were in surgical service. You might say that I specialized in it.

Q. 17. Were you connected with any hospitals in New York City, doctor?

A. New York Hospital, New York Cancer Hospital, St. Luke's Hospital, St. Francis's Hospital, Babies Hospital, Hospital for the Ruptured and Crippled. Maybe one or two more.

Q. 18. Were you on the staff of any of those hospitals, doctor? A. All of them.

Q. 19. It is a fact that you were the head of the surgical staffs of any of those hospitals, doctor?

A. Yes.

Q. 20. Which hospital or hospitals?

A. Babies Hospital.

Q. 21. What years were you the head of the staff of the Babies Hospital, doctor?

A. From 1910 until the time I retired. In 1910 I first went there. [236]

Q. 22. During your professional career, doctor, to what extent, in the course of your professional training and practice, have you become familiar with surgery incident to intestinal obstruction in the newborn due to volvulus?

A. I was in charge of the Babies Hospital twenty

(Deposition of William A. Downes.)

years. I saw all of the intestinal cases, all of the serious cases that came in during that time, including volvulus, intussusception, and pyloric stenosis.

Q. 23. The Babies Hospital, doctor, as its name implies, I assume treats primarily infants.

A. I think the age limit was supposed to be four years old.

Q. 24. That is, from birth to the age of four?

A. Yes.

Q. 25. To what extent, in the course of your professional training and practice, have you become familiar with general surgical conditions of infancy and childhood?

A. Well, we had all sorts of surgical conditions in childhood in the Babies Hospital. When I was active, I did the important cases. We had such fellows as Dr. Donovan here coming along, and doing the others.

Q. 26. But, doctor, during all of the years of your surgical practice you were in large part performing operations on infants?

A. I would not say that that was the large part. I was known more or less as a specialist in infant surgery. [237]

Q. 27. Doctor, how does the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compare in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood?

(Deposition of William A. Downes.)

A. We class volvulus as a major surgical condition. A man needs certain experience and opportunity to see those cases before he becomes proficient in the care of them. We class volvulus as a very serious condition; one of the most serious that you can have with young babies.

Q. 28. Doctor, how does such operation for correction of such obstruction compare in probability of success and recovery of patient to operations for correction of other serious conditions of infancy and childhood?

Mr. Robertson: I will object to that, if the court please, because it calls upon the witness to make a comparison and a conclusion which is irrelevant.

Mr. Allen: I think it is a pertinent inquiry, your Honor, as to the knowledge of the expert concerning the surgical condition in issue.

The Court: It is a qualification question. [238]

Mr. Allen: And going to the comparative seriousness or gravity involved in this case.

Mr. Robertson: The question was clearly not ask to qualify Dr. Downes, but asked to compare the operation Dr. Donovan did with another operation and for that it is a comparative question and irrelevant.

The Court: Objection overruled.

A. To begin with, it depends on how soon after the trouble was noticed that the surgeon gets the case. Per se, the operation is one of the most serious—the condition is one of the most serious there is, in babies.

(Deposition of William A. Downes.)

Q. 29. How does such operation compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced age or in cases of adults?

Mr. Robertson: The same objection, and I would like a continuing objection to all questions along this line.

The Court: Same ruling. You may go ahead.

A. With the child, it is the more serious operations. The [239] procedure, how to go ahead when he is operated, is often guided by the experience of the surgeon. His condition has to be handled with the greatest care. The outcome depends upon the judgment which the man uses in doing the operation, knowing what to do and what not to do.

Q. 30. How does such an operation, that is, for intestinal obstruction by reason of volvulus, compare in probability of success and in probability of recovery of the patient, to some of the operations performed by surgeons upon children of more advanced years or upon adults for the correction of conditions of a related degree of seriousness?

A. To begin with, as I said before, the seriousness of the operation depends at the start on the age of the patient. With a young infant it is very much more serious than in an adult; and that is where the experience of a children's surgeon comes in. A man who operates for volvulus on an adult will do it perfectly well as a general surgeon, but in an infant the man who has had the experience is the one who gets through the operation.

(Deposition of William A. Downes.)

Q. 31. Let me ask you this, doctor. In answering the few questions heretofore, where comparative operations are suggested, the skill of the surgeon performing the operation is always involved, is it not? A. Yes.

Q. 32. To what extent, if you know, must a surgeon have special- [240] ized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus, in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover?

Mr. Robertson: I object to that question on the ground it is permitting the witness to speculate and forecast. It is entirely impossible for even a specialist and expert to make a guess upon. You are not calling for an opinion of the specialist, but just asking him to make a guess.

Mr. Allen: I note, your Honor, that Question 32 is amended by counsel thereafter, so maybe we had better consider the amended question.

Q. 32. Amended: From your experience, doctor, to what extent, if you know, must a surgeon have specialized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus, in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover? [241]

(Deposition of William A. Downes.)

Mr. Robertson: Same objection.

The Court: Overruled.

A. I can best illustrate that by saying that when a medical man has a baby in his practice that he thinks has volvulus or other intestinal obstruction he makes an effort to get the surgeon best qualified to do babies' work.

Mr. Robertson: I object to the answer to that question for the reason that it is not responsive and states a conclusion of the witness.

Mr. Allen: I concede the correctness of the objection.

The Court: Proceed with Question 33.

Q. 33. Doctor, from your experience, when a doctor ascertains that a newborn baby has an intestinal obstruction due to volvulus is it the practice and would it be the course of wisdom for him to call in a surgeon who is specialized in such operations?

A. By all means, if you can get one.

Q. 34. Dr. Downes, from your experience as the head of the [242] Babies Hospital, will you give the benefits that the surgical profession receives from its formation and its conduct.

Mr. Robertson: Object to that as being entirely immaterial.

The Court: All right. The objection is good.

Mr. Allen: I believe it is good and consent to sustaining it.

Q. 35. I mean what special facilities are present in a hospital such as the Babies Hospital, by which

(Deposition of William A. Downes.)

surgeons can better their knowledge on intestinal conditions of newborn babies and their treatment of them?

Mr. Robertson: Same objection.

Mr. Allen: As to that objection, I would say, your Honor, that apparently the question is foundational to the later showing within the deposition that the plaintiff in this case, subject of this expert's testimony, as a part of his qualifying training and as a very substantial portion of his experience in the field of specialized surgery, has been connected with Babies Hospital; consequently, I think it has materiality in going to show the doctor's training.

[243]

The Court: Objection overruled.

A. Almost every good hospital has a babies' department: St. Luke's; New York—and they have experienced internes and experienced nurses in babies' wards: that is about all I know of. Of course they have incubator service, and things like that; but all good hospitals have those things.

Q. 36. Doctor, in the course of your surgical experience have you come in contact with conditions of intestinal obstruction due to volvulus in newborn babies? A. Yes.

Q. 37. Have you performed operations in those cases? A. I have.

Q. 38. And you have made a special study of that type of operation, doctor?

A. I would not want to say that I have made an especial study of that type of operation.

(Deposition of William A. Downes.)

Q. 39. But in the course of your other studies, you have studied that also?

A. Yes, I have operated on them in proportion relatively: the same number of those cases as of intussusception and other things.

Q. 40. Doctor, what surgeon or surgeons of the state of New York, if you know, had had sufficient special and outstanding training and experience on April 1, 1939, to [244] prepare and fit him or them to perform such operation for correction of intestinal obstruction in the newborn due to volvulus with high degree of probability that such operation would correct such condition and that the newborn patient would recover?

Mr. Robertson: I object to the question, if the Court please, because it singles out only the state of New York, out of the forty-eight other states and possessions and territories.

The Court: I have passed on that objection, so the objection will be overruled.

A. You want me to mention names?

Q. 41. Yes: any surgeons that you know of in the state of New York.

A. I only knew surgeons who more or less specialized in babies' surgery, that is, I mean to say that were on the staff of the Babies Hospital. Dr. Donovan would be my first choice. Then there would be Dr. Heeks, who is an assistant there; Dr. Solley. They happen to be the only ones that I know of personally now. A great many have come up since my time.

(Deposition of William A. Downes.)

Q. 42. In listing the surgeons you have just listed, doctor, can you state with regard to ability where Dr. Donovan would stand in that list? [245]

A. He would stand first. He was in charge of the institution, and has had more experience.

Q. 43. You place him first, you say, and what would be the reason for placing him first, doctor?

A. His experience.

Q. 44. His experience in this type of operation?

A. Yes, babies' work.

Q. 45. Do you know of your own knowledge that at that time Dr. Donovan had performed operations for intestinal obstructions in the newborn?

A. At what date was this?

Q. 46. April 1, 1939.

A. I remember Dr. Donovan must have graduated about 1920. I was the attending surgeon at St. Luke's Hospital and Babies Hospital, and I appointed him assistant at both of those places, and he has gradually grown up. He probably did like I did when I was an interne and acting assistant, sat around in the corner holding the bag.

Q. 47. Doctor, you used the *nervacular*, "holding the bag". Will you explain what you meant by that, in your previous answer.

Mr. Robertson: I object to that question as being entirely irrelevant and immaterial, and as not responsible to the previous question.

Mr. Allen: It is explanatory of the answer to the previous question. [247] It makes no earthly difference to the ultimate issue in the case.

(Deposition of William A. Downes.)

The Court: It may go out.

Q. 48. Doctor, it is the doing of those things that you have named that eventually lead to skill in surgery?

Mr. Robertson: The same objection as to Question 48.

The Court: All right.

Q. 49. So, in repetition, doctor, it is your testimony that Dr. Donovan, in your opinion, from your experience, stood as the most eminent baby specialist surgeon in New York City at that date?

Mr. Robertson: Object to that as leading.

Mr. Allen: I think, in view of the fact it states it is repetition, that it is very apparent that it is a question merely for emphasis, and could be either denied or allowed.

The Court: Your representative in New York consented to strike it out. [247]

Mr. Allen: I did not notice that.

Q. 50. Doctor, from your knowledge and experience, in what position would you fix Dr. Donovan in the City of New York and in the State of New York relative to his ability to perform operations on newborn babies?

Mr. Robertson: I object to the question because it is evident from the doctor's testimony that he has had no knowledge of Dr. Donovan's work since 1927, when he retired.

Mr. Allen: Well, I don't think the objection is well taken.

(Deposition of William A. Downes.)

The Court: The objection is overruled and the answer may be read.

A. Based on my knowledge before 1927, when he used to help me operate, and from my experience at that time, I would say that Donovan was head and shoulders above any other man in New York. It is very difficult to find a man who is willing to give his time to infant work.

Q. 51. You found that Dr. Donovan did give his time in that way?

A. Yes. Of course, when a man gets an opportunity to be head of Babies Hospital surgical department, he becomes ambitious to be on top of his profession in that branch. [248]

Q. 52. Doctor, from your experience and knowledge of surgical affairs throughout the nation, what is your opinion as to the position that Dr. Donovan stands in relative to the operation and surgical treatment of newborn babies suffering from intestinal obstruction due to volvulus?

Mr. Robertson: I object to that question, because there is no showing that the witness has any knowledge whatsoever of surgical affairs throughout the nation. In fact, he has already stated that his knowledge is very limited, and confined to New York and vicinity.

The Court: The objection is overruled. Go ahead, read the answer.

A. I would say that he stood at the top. I only know of one other surgeon in this country who has

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grown up in baby surgery exclusively. That is Dr. Ladd, in Boston, head of the Childrens Hospital in Boston.

Q. 53. So in your opinion Dr. Ladd and Dr. Donovan then are the two outstanding surgeons in this special line of operation in the nation?

A. To my knowledge. That is limited to my own personal knowledge. You would hardly believe it if Dr. Donovan were to tell you how many infants under two or three months old that he has operated on for various conditions. [249]

Q. 54. It is that knowledge of yours that leads you to answer these previous questions correctly, doctor, is it not? A. Yes.

Q. 55. Can you state, doctor, from your own knowledge, what surgeons in the United States were then, that is, April 1, 1939, generally regarded by the members of the medical profession of the United States as those best qualified in the field of specialized surgery for intestinal obstructions in the newborn due to volvulus?

Mr. Robertson: I object to the question because there is no evidence of any such knowledge on the part of the witness.

The Court: The answer may come in.

A. I could not answer that question, because it has been ten or twelve years since I have seen a number of surgeons together and discussed it. Hospitals as a whole are taking much more interest in surgery of babies than they used to, because men are being trained to specialize in it.

(Deposition of William A. Downes.)

Q. 56. Doctor, from your own knowledge and experience can you state what training and experience Dr. Donovan had prior to April 1, 1939, which particularly qualified him to engage in the professional practice as a surgeon giving such specialized attention to newborn babies?

Mr. Allen: I anticipate that there will be a motion to strike the answer as not responsive, and have no objection to it.

Mr. Robertson: Yes, there is.

(Answer not read.)

Q. 57. Doctor, since 1927, when you retired, what contact have you had with Dr. Donovan relative to his professional activities?

A. He was in the office with me up until the time I—in 1927 I quit operating as a surgeon, but I looked after general things for a year or so, and used to go to the hospital; but in the last several years I have had no contact with Donovan as a surgeon. The most I have seen him is to talk things over. He has come to me to discuss cases a good many times.

Q. 58. Since 1927, doctor, have you kept in touch with the surgical profession by reading their pamphlets and books and statements that come out?

A. Yes.

Q. 59. Doctor, have you any knowledge as to the degree to which Dr. Donovan was in demand on or about April or [251] May, 1939, at meetings of medical society members as a speaker on subjects

(Deposition of William A. Downes.)

related to the field of intestinal obstruction of newborn infants?

Mr. Robertson: That is objected to as immaterial.

The Court: The answer may be read.

A. I can only answer that by reading programs and papers that appear in surgical journals Donovan has been very much sought after for reading papers before medical societies, both local and national.

Q. 60. You know that of your own knowledge, doctor? A. Oh, yes.

Q. 61. The subjects that he wrote papers on had to do with the operative technique for intestinal obstructions in newborn children, or did some of them?

A. Including the stomach, I would say that was true, stomach and intestinal. He is too modest to tell you.

Mr. Allen: The latter portion may be stricken by consent.

The Court: Yes.

Q. 62. Doctor, you yourself—forgetting all due modesty, were one of the outstanding surgeons in the City of [252] New York up to the date of your retirement, were you not?

A. I think Donovan ought to answer that for me. I have been answering questions for him.

Q. 63. Doctor, have you had an opportunity in the course of your years of practice, as a physician

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and surgeon, to know from time to time the basis upon which the more prominent and higher ranking surgeons of New York City determine the fees which they charge for surgical operations?

Mr. Robertson: I object to the question for the reasons stated in objections to the deposition, that is, that the only issue is a fair and reasonable value of the services done by the plaintiff in the case, and for the further reason that there is no foundation which would entitle the witness to express an opinion, and moreover, had such a foundation been laid, that it would be immaterial as to what the custom was in the City of New York.

Mr. Allen: I have only to say that so far as the question goes, it is not dealing with the general field of rank and file of surgeons in New York or elsewhere in this particular case. It is dealing with unusual circumstances of an admittedly specialized surgeon of eminent qualifications. [253]

Mr. Robertson: The law does not know whether it is an ordinary physician or surgeon. His eminence is simply another factor to be taken into consideration in the testimony of the person, but my objection is that this witness has not shown any knowledge of fees charged by other doctors.

Mr. Allen: It is a foundational question, your Honor.

The Court: The question may be answered.

A. I have not had an opportunity of making that comparison myself in the last ten years, probably.

(Deposition of William A. Downes.)

Mr. Robertson: I move to strike the answer for the reason that it is not responsive and clearly shows the witness is not competent to answer the question.

Mr. Allen: I oppose the objection. It indicates the extent of the understanding of this doctor.

The Court: Your motion to strike is denied.

[254]

Q. 64. Did you have such experience prior to your retirement, doctor? Yes or No, please.

A. Yes.

Q. 65. Doctor, have you had the opportunity in the course of your professional practice to know the amount of fee which has been charged from time to time by the more prominent and more able physicians and surgeons of New York City for specialized operations which they have performed?

Mr. Robertson: I object to that, if the Court please, for the reason that the witness's testimony shows that he has no knowledge of any fee schedule or of any custom existing as of April, 1939, because he retired in 1927, before the crash, and his ideas would naturally be higher, or at least the fee schedule he knew about would have been higher than it was in 1939, and, in addition, I object on all of the other grounds I have urged.

The Court: Objection overruled. I think it would go to the weight of the testimony. Go ahead.

A. I would say yes.

Q. 66. Doctor, have you had the opportunity in

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the course of and by virtue of your practice as a surgeon to learn and know how such fees have been generally regarded [255] by the members of the medical profession of New York City, as to whether or not they constituted and represented the reasonable value of the professional services involved?

A. I have no way of answering a question of that sort.

Q. 67. Doctor, have you had the opportunity while you were in practice, as a result of and in the course of your years of practice as a surgeon, to learn and know the amount of the charge of prominent and able surgeons who give specialized attention to surgical conditions of infancy for performing the operation for correction of intestinal obstruction in the newborn due to malrotation of the intestines, with volvulus?

Mr. Robertson: I object to that on all of the grounds I have urged to previous questions.

The Court: Objection overruled.

Q. 68. I am just asking for a Yes or No in that, doctor, if you have that knowledge.

A. I would say No, I haven't.

Q. 69. In your past experience, doctor, there have been times when you have performed such an operation and have made a charge; is that correct?

A. Yes.

Q. 70. And you have known of other surgeons of prominence who [256] have made similar operations and charged a fee, have you not, doctor?

(Deposition of William A. Downes.)

A. I don't recall any specific instance of what the charge was. In other words, you would like me to tell you whether I know of any surgeon having this kind of a case, what he charged?

Q. 71. I want to know whether you have known in your experience of a surgeon performing such operations and charging a fee for them.

A. Yes.

Q. 72. Doctor, have you had the opportunity, in the course of and by virtue of your years of practice as a surgeon, to learn and to know what has been the practice from time to time of prominent and able surgeons of New York City in fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and go to distant points within the United States to perform such operations?

Mr. Robertson: Your Honor, to the next two or three questions, there is no intelligible answer given, and the doctor has already stated he has no recollection of any fees he charged, and has no knowledge of fees charged by other men, so I object to Question 72, Question 73, and also Question 74 for that reason. [257]

Mr. Allen: Let us take them up one at a time.

The Court: All right, 72 now, a yes or no answer.

Mr. Allen: That calls for an answer which would constitute an element of foundation, as to

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whether or not he has knowledge of one of the elements to be considered by him.

The Court: The witness may answer.

Mr. Robertson: The answer is yes.

Mr. Allen: 72 is a repetition as to that.

(Question 72 was not read.)

Q. 73. Have you had the opportunity in the course of and by virtue of your professional practice to learn and to know what has been the custom from time to time of prominent and able surgeons in going to distant points and there performing specialized operations on the matter of returning patients to the care of local physicians and surgeons as soon after the operation as the condition of the patient indicates the termination of the need for [258] specialized care?

Mr. Robertson: I object to that on the ground it is immaterial.

Mr. Allen: I urge the same grounds in support of it, that it goes to the qualification of the expert.

The Court: The answer may be read.

A. I would say Yes.

Q. 74. What is that practice, doctor?

A. The practice is when an operation is over they turn the patient,—if the condition is such, to turn the patient over either to the family doctor or leave your assistant.

Q. 75. What, if you know Doctor, has been the general attitude of the members of the medical profession relative to approving or disapproving such custom?

(Deposition of William A. Downes.)

A. They approve of it. There would be no objection to that.

Q. 76. Have you become familiar with and are you able, based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the reasonable value of the professional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently [259] qualified surgeon of the City of New York in performing a specialized surgical operation when you know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations

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of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and surgeon; the facts and circumstances which indicate whether the operation was or was not successful, and the facts and circum- [260] stances tending to indicate whether or not the patient should be reasonably expected to recover; knowing all that, doctor, are you from your past experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

Mr. Robertson: Now, if the court please: I object to the question, first because the foundation for the expression of any opinion by this witness has not been established, and, in fact, his own testimony shows that he has no ability to enable him to express an opinion as to a fee in 1939; and for the second reason that it singles out specialists and the fee they are entitled to charge, whereas the law on the subject is that it is only the reasonable charge that is to be made by any surgeon, and the fact that he may be one of the top men, or a specialist in a particular type of surgery is not to be taken into consideration in the expression of an opinion by any member of the profession, and for the reason that it incorporates facts not in the record.

The Court: Will you indicate what facts that

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are incorporated in this preliminary question that are not in the record in the case? [261]

Mr. Robertson: Just a second. No, I withdraw that, your Honor. Did you understand me? I said I withdraw that. But as an additional objection, it excludes from the testimony of this witness in stating his opinion, the element of the ability of the patient to pay. No place is that expressed as one of the considerations he is to take into consideration in expressing an opinion, and the law is that it must be considered in expressing an opinion.

The Court: The same question was presented here when Dr. Thompson was on the stand.

Mr. Robertson: Yes, sir.

The Court: And the court ruled, sustained the objection to the question, that the element was not in it.

Mr. Robertson: I want to give you a chance to change your mind.

The Court: I think I will be consistent, at least. I want to say this to counsel: I have in a hasty way examined these depositions, and if I have read them correctly, [262] the hypothetical question is practically the same. I think there is one sentence that is different. The question propounded is a lengthy one, and I presume counsel will have occasion to point out to the court the objections that may be raised to this question. I would not want to be hasty in ruling. If there is some question now that has not had the consideration of the court, I would hear counsel and rule further on that.

(Deposition of William A. Downes.)

Mr. Robertson: I believe, your Honor, that at the conclusion of one of these depositions, by some kind of stipulation or agreement as to objections I will have to voice to the material part of the other two depositions, that we can dispense with the ruling on them. I do not believe that the opinions of these doctors are admissible, first, because they show that they have no knowledge of any general fee schedule or any general system. They all admit that the ability of the patient to pay in New York is considered as one of the elements, but the hypothetical question that was propounded to them, and upon which they expressed an opinion, does not contain that element, and I do not, therefore, believe the depositions, except for the qualifying parts, are admissible in any sense of the word.

Thereupon the court took a ten minute recess, after which the trial was resumed. [263]

The Court: Now, as I indicated to counsel during the morning session, I have read these three depositions through, and I do not see the occasion of going through the depositions again now. They are here subject to the objections that are made, or that counsel desires to make to them, and as to the rulings on these depositions, it seems to me that these are matters that the court can rule upon in the final conclusion of the case. I do not see the occasion for going through the depositions again now, and the counsel can, at the proper time, furnish the court with a memorandum brief on the particular

points they desire to raise on the depositions.

Mr. Allen: In other words, the court's ruling is reserved and counsel will be permitted to submit a memorandum to the court on the admissibility.

The Court: Your objections are in the record, and the court will then have an opportunity to rule on them, when the case is all through.

Mr. Robertson: Yes, sir.

Mr. Allen: The answer to that last question is "Yes". [264]

It Is Stipulated by and between counsel for the respective parties that the following questions, and objections, being that part of the deposition of William A. Downes, a witness on behalf of the plaintiff, not read into the record at the time of the trial of this case, and the depositions of Carl G. Burdick and Fenwick Beekman, witnesses on behalf of plaintiff, and taken at the instance of the plaintiff, before Albert Gerber, a notary public, on the dates hereinafter and heretofore mentioned, are herewith incorporated into the transcript of testimony and, pursuant to this stipulation, are to be considered as though read and objections made at the trial of this case.

Deposition of William Downes,
(continued)

Q.77. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and State of New York, after completion of the usual pre-college schooling, attended the College of Physicians and Surgeons of Columbia

(Deposition of William A. Downes.)

University from 1917 to 1920, graduated with the degree of M.D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assum- [264-A] ed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-in Hospital in New York City, and that during the first year of practice received appointments as Assistant Attending Surgeon at Babies Hospital of New York City, and at St. Luke's Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted to Associate Attending Surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as Assistant Professor of Surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting, and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he

(Deposition of William A. Downes.)

was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full Attending Surgeon, which is the highest rank given at St. Luke's Hospital, [264-B] *at St. Luke's Hospital*, and together with associate Surgeon was placed in charge and is still in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as Consulting Surgeon at the Yonkers General Hospital at Yonkers, New York, at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to membership in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice had been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the

(Deposition of William A. Downes.)

country, and that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference text book in use in the United States, and that he collaborated in panel discussions on intestinal [264-C] obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan established private offices in the City of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and that if it be further assumed that Dr. Donovan thereafter continued and now continues to carry on such specialized professional practice; and if it be further assumed that by April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants

(Deposition of William A. Downes.)

due to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about [264-D] April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified, by his training and experience, to perform surgical operations for the corrections of intestinal obstruction in the new-born due to malrotation of the intestines, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was apparent to the physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed, that beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that the following the taking of gastro-intestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal condition of such infant; and if it be further assumed that the said defendants in

(Deposition of William A. Downes.)

such ac- [264-E] tion, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such new-born child, of the apparent necessity for such surgical operation and of the seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physicians as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan's high qualifications and his unusual degree of experience, for correction of intestinal obstruction of the newborn child, then apparently needed by their infant son; and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. [264-F] Donovan to perform such operation on their infant son; and if it

(Deposition of William A. Downes.)

be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent condition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the fur- [264-G] ther authority and instructions of such parents and for and on behalf of such parents did advise the said

(Deposition of William A. Downes.)

Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed; without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation, and [264-H] if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did leave his New York City office and his practice to be cared for by his agents

(Deposition of William A. Downes.)

and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939, and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of mal-rotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium, Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: That there was no fusion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where [264-I] the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by

(Deposition of William A. Downes.)

a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the perietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition [264-J] of such infant was good at the completion of such operation; and if it be further assumed that such infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it be further assumed that the said Dr. Donovan, after completing such operation in such manner and

(Deposition of William A. Downes.)

in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; and if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent normal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position; and if it be further assumed [264-K] also that the said Dr. Donovan, for a substantial period of time after his return to New York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extending his professional advice, as such specialist, to such attending physician; then and under all of such circumstances what, in your

(Deposition of William A. Downes.)

opinion, would be the reasonable value of such professional services provided by the said Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to upon the following grounds:

1. The said hypothetical question includes and contains immaterial and irrelevant assumptions;

2. The said hypothetical question includes and contains assumptions based upon unsworn statements of third persons not parties to the action;

3. The said hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action;

4. The said hypothetical question requires the witness to determine what facts are established by the unsworn statements of other persons not parties to the action [264-L] and to take such facts as he so finds into consideration in forming his opinion.

A. \$12,000 to \$15,000.

Mr. Schmidt: You *may* cross-examine, Mr. Burdeau.

Cross Examination

By Mr. Burdeau:

XQ. 78. Doctor, you enumerated some doctors that you regarded as particularly qualified in child surgery. Do you recall the names now of the doctors you mentioned?

A. Donovan; Heeks; Solley.

(Deposition of William A. Downes.)

XQ. 79. And Dr. Donovan? A. Yes.

XQ. 80. They all were at one time or another connected with Babies Hospital?

A. All connected with it now.

XQ. 81. Are they the only doctors that you regard as competent in that kind of work?

A. No. I said they were the ones that I knew personally.

XQ. 82. They were the ones that you knew personally? A. Yes.

XQ. 83. Is it possible that there are any number of competent surgeons capable of carefully and efficiently performing work of the kind involved in connection with Mr. Jeffcott's child? [264-M]

A. Certainly. I understood this gentleman asked me for my own knowledge.

XQ. 84. You have been a practicing surgeon——

A. I say he asked me for my own knowledge, was the reason I mentioned those that I did.

XQ. 85. I understand; but I don't want you to tell me that there are other competent surgeons unless you know that to be a fact.

A. Oh, I know that to be a fact. I have never seen them operate on babies; but I know their reputation and their writings.

XQ. 86. A man of that type, recognized as a competent surgeon, can successfully perform the kind of operation that Dr. Donovan performed in this case; is not that correct?

A. I would say that was probably correct.

(Deposition of William A. Downes.)

XQ. 87. You have had a long association with Dr. Donovan, haven't you?

A. Since 1920.

XQ. 88. Until 1927, when you retired, you were in active cooperation with him, were you not?

A. He was an assistant at St. Luke's Hospital and at Babies Hospital.

XQ. 89. And that is where you had an opportunity to form your opinion of Dr. Donovan?

A. Yes.

XQ. 90. And you have formed a very favorable opinion of Dr. [264-N] Donovan. A. Yes.

XQ. 91. And most of your testimony here today has been based upon your personal opinion of Dr. Donovan?

Mr. Schmidt: I object to that.

A. He must be recognized as competent.

XQ. 92. I asked you if your testimony was based upon your personal opinion of Dr. Donovan?

A. Yes.

XQ. 93. Do you know the nature of the operation that was performed in this case?

A. Only by Dr. Donovan's mentioning it to me.

XQ. 94. Dr. Donovan called upon you?

A. Oh, well, I have seen him every day when I was in the same office.

XQ. 95. I am talking about the operation on Mr. Jeffcott's child: it was intestinal obstruction due to volvulus? A. Yes.

XQ. 96. Your information as to what this oper-

(Deposition of William A. Downes.)

ation consisted of came from Dr. Donovan, did it?

A. Absolutely.

XQ. 97. Whatever you know about Dr. Donovan's employment in this matter has been related to you by him; is that correct? [264-O]

A. That is correct.

XQ. 98. What has been your relationship with Dr. Donovan since your retirement in 1927?

A. All the people who came to me I referred them to him for advice or operation.

XQ. 99. You had no business arrangement with him? A. No.

XQ. 100. You derived no gain of any kind from that association?

A. None except good will.

XQ. 101. Dr. Donovan arranged to have you testify in this case?

Mr. Schmidt: I stipulate to that.

A. You mean in this present meeting?

XQ. 102. Yes.

A. Yes. I understood it was going to be last spring.

XQ. 103. In reference to the question of operation for the relief of an intestinal obstruction caused by volvulus in an infant, is there any standard charge for that kind of an operation?

A. No. There is no standard charge for any operation, that I know of.

XQ. 104. Charges for the same kind of an operation have a wide range, have they?

(Deposition of William A. Downes.)

A. Very. Conditions guide the price in every instance.

XQ. 105. What factors would you take into consideration in estimating the fairness of another surgeon's charge? [264-P]

A. To begin with, it would depend entirely upon the ability to pay and the social standing of the individual.

XQ. 106. And the skill of the surgeon would be of secondary consideration?

A. We assume that the surgeon is skillful.

XQ. 107. And a doctor need not be what I would call in the vernacular "a top flight surgeon" in order to perform a skillful operation, need he?

A. No.

XQ. 108. And as I understood you to say the social position and financial condition of the patient or the persons employing the surgeon are the primary considerations?

A. I did not say primary. But I think that they are the first considerations. I think the ability of the surgeon is important. And that is the way to gauge the ability of a surgeon; when his record is good.

XQ. 109. Well, the reputation of a surgeon to some degree depends upon his favorable opportunities, doesn't it?

A. Do you mean as a surgeon?

XQ. 110. Yes; I am talking about reputation as distinguished from skill. That depends to some extent upon his favorable opportunities?

(Deposition of William A. Downes.)

A. I would say so, yes. [264-Q]

XQ. 111. And a man may be skillful without having a brilliant reputation? A. Yes.

XQ. 112. I understand you to say that for a particular kind of operation there is no fixed standard for determining what the reasonable charge would be?

A. No, there is not. The only standard anybody has to go by or to act upon is the standard of state compensation, and that is for laboring classes.

XQ. 113. In your opinion, would the fact that Mr. and Mrs. Jeffcott, the parents of the baby involved in this case, employed two or more nurses for its care have any bearing upon the reasonableness of the charge for surgical services in the case?

A. I don't think that would enter into it.

XQ. 114. Has the hypothetical question put to you been discussed by you with Dr. Donovan?

A. The condition was discussed in a general way, some months ago, with Dr. Donovan, but not at all since the hypothetical question was asked.

XQ. 115. If you assume that the infant son of the defendants has never been in a normal condition since the operation performed by Dr. Donovan but that said infant suffers from an open fistula, would that fact make any difference in your opinion as to the value of the services rendered by Dr. Donovan? A. No. [264-R]

XQ. 116. In the hypothetical question put to you you have been asked to assume that "the said Dr.

(Deposition of William A. Downes.)

Donovan in the course of performing his said employment undertaking, did find the pathology to be as follows: namely, that there was no fushion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right around the root of the mesentery about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed, that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction." All this means in plain English is that the child had an intestinal obstruction due to a kinking or twisting, does it not?

A. Intestinal obstruction is a grave condition which requires expert surgery, especially when it is of [264-S] congenital nature.

Mr. Burdeau: That is all.

[Title of District Court and Cause.]

DEPOSITION OF CARL G. BURDICK.

State of New York

County of New York—ss.

Deposition of Carl G. Burdick taken pursuant to the annexed notice dated at Tucson, Arizona, the 12th day of November, 1941, as a witness on behalf of the plaintiff in the above entitled action, before Albert Gerber, a duly appointed and qualified notary public of the State of New York for the county of New York, at the office of the said Carl G. Burdick, No. 140 East 54th Street, Borough of Manhattan, City, County and State of New York, beginning at 11 a.m. on the 3rd day of December, 1941, to which time and [264-T] place the taking of said deposition was adjourned by consent of counsel for the respective parties herein.

Appearances:

ARTHUR T. SCHMIDT, Esq.,
Attorney for the plaintiff.

FRUEAUFF, BURNS & RUCH, Esqrs.,
By JOSEPH A. BURDEAU, Esq.,
Of counsel for the defendants.

CARL G. BURDICK,
of lawful age, duly sworn as a witness on behalf
of the plaintiff, testified as follows:

Direct Examination

By Mr. Schmidt:

Q. 1. What is your name, doctor?

(Deposition of Carl G. Burdick.)

A. Carl G. Burdick.

Q. 2. Where do you reside?

A. I am residing at Wilton, Connecticut.

Q. 3. Do you have an office at 140 East 54th Street? A. Yes.

Q. 4. What is your profession, doctor?

A. Surgeon.

Q. 5. When and where were you admitted to practice as a physician and surgeon?

A. 1907. In New York State.

Q. 6. What schools did you attend in preparing for the practice of such profession?

A. I was graduated from Columbia Medical School. I did [265] *did* not go to college before that. I went to high school. I went from high school into medical school. I graduated in 1903.

Q. 7. That was known as the College of Physicians and Surgeons?

A. The College of Physicians and Surgeons, yes.

Q. 8. Run under the auspices of Columbia University? A. Yes.

Q. 9. How long were you in attendance at that school, doctor? A. Four years.

Q. 10. What degree, if any, did you receive from that school? A. M. D.

Q. 11. When did you have any other and special training which was designed to fit and prepare you for the practice of such profession?

A. I spent two years as an interne at the New

(Deposition of Carl G. Burdick.)

York Hospital; six months as an interne at St. Mary's Hospital for Children; and four months as an interne at the Lying-in Hospital.

Q. 12. And that was all prior to what year?

A. Prior to 1907.

Q. 13. Are you a member of any professional organizations in which admission to membership depends upon demonstration of special professional qualifications or accomplishments?

A. I suppose you may call those the American College of Surgeons, the American Board of Surgery, the New York Surgical Society, and the American Surgical Association. [266]

Q. 14. And you are a member of all of those?

A. Yes.

Q. 15. And do they call for any special demonstration of professional qualifications for admission? A. The New York Surgical Society——

Mr. Burdeau: I object to that. It calls for a conclusion, and does not enumerate specifically what qualifications are regarded as special.

Q. 16. Doctor, the American Surgical Society is an honorary society, is it not?

A. It is a society which is comprised of 150 or 175 members, I don't remember which. It may be 175 surgeons, in the United States and Canada; they are picked out presumably for their eminent qualifications in surgery. I might say that it is the outstanding surgical association in this country.

Q. 17. And, from the whole of the United States

(Deposition of Carl G. Burdick.)

and Canada, the number of members is limited in that association to 175?

A. I think it is 175. I think they have pushed it up to 175. It used to be 150.

Q. 18. Doctor, will you please state fully the nature and extent of your past experience in the practice of your profession.

A. I have been connected with a number of hospitals, but I have been connected with Bellevue since 1909. I [267] retired this fall. Beginning as an assistant, then for a time, I guess for six years, I was in charge of the children's surgical service at Bellevue, then in 1925 I was made director of the fourth surgical division, a position which I held until just this fall. There are four divisions at Bellevue, just like four different hospitals really. I was head of the fourth division. And I have been connected with the Hospital for the Ruptured and Crippled.

Q. 19. In what capacity were you connected with the Hospital for the Ruptured and Crippled?

A. I started there as an assistant; and I have been visiting surgeon and what they call chief of the surgical service. I was made that about six or eight years ago.

Q. 20. And you still are that, doctor?

A. I am still that there.

Q. 21. Chief of the surgical service of the Hospital for the Ruptured and Crippled in New York City?

(Deposition of Carl G. Burdick.)

A. Yes. Then I have been connected with other hospitals throughout my limited career.

Q. 22. For how many years past have you specialized solely in surgery, doctor?

A. I have never done anything but surgery since I started to practice.

Q. 23. To what extent in the course of your professional training and practice have you become familiar with [268] surgery incident to intestinal obstruction in the newborn due to volvulus?

A. At Children's Surgical Service at Bellevue, we see a certain number of those cases down there. In fact, however, we do not happen to see as many down there, for instance, as they see at Babies Hospital.

Mr. Burdeau: Could I interpose there to put one question?

Mr. Schmidt: Yes.

By Mr. Burdeau:

Q. 24. Could you give me a rough estimate of the number of such cases a year that you saw at Bellevue?

A. No. As I say, we do not see so many of them down there. Just why, I cannot say; but the fact remains that we do not.

By Mr. Schmidt:

Q. 25. Would that indicate to you from your experience that it is a rather rare and special condition?

A. It is that. And I think that certain hospitals

(Deposition of Carl G. Burdick.)

have a reputation for doing those things and those cases are more apt to be sent there.

Q. 26. To what extent in the course of your professional training and practice have you become familiar with general surgical conditions of infancy and childhood?

A. Of course, I was at the head of the children's [269] surgical service at Bellevue, that is, I started there when it was formed as an entity, which was in 1916, I was assistant, then after the war I was made visiting surgeon in charge, and I was in charge of that service until about 1930. I would say that I was fifteen years connected with the children's surgical service, which dealt exclusively with the surgery of children.

Q. 27. How does the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compare in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood?

Mr. Burdeau: That I object to as purely speculative and indefinite; the comparison of one, with something indefinite and uncertain.

Q. 28. Doctor, before you answer that question let me ask you: From your experience is it possible to compare the difficulty of performance of a surgical operation for that type of intestinal obstruction in a child due to volvulus, with other operations to correct serious conditions of infancy in childhood?

(Deposition of Carl G. Burdick.)

A. I would say that intestinal obstruction in the upper part of the bowel in infants, in the first place, is a comparatively rare condition; and, in the second place, a condition that not very many surgeons are [270] qualified to cope with.

Q. 29. So your answer to my last question is that you can compare the difficulty between those two types of operation?

A. I would say, for instance—take myself, for example: I have seen a lot of intestinal conditions in children, that is, obstruction lower down, intussusception; but so far as obstruction of the upper part of the small bowel, the duodenum, and so on, we just haven't had them down at Bellevue.

Q. 30. And because of the rarity of their appearance would you say, from your experience, that they call for an operation of a specially serious nature?

Mr. Burdeau: I object to that.

Mr. Schmidt: As to form?

Mr. Burdeau: No. I object to it because it is a comparison of one definitive, with anything within the range of possibility in the shape of abnormal conditions requiring surgery.

Mr. Schmidt: Will you answer it, then, doctor?

The Witness: I would like the question again.

(Q. 30 repeated by the reporter.)

A. I would not answer that quite that way, if I may have that liberty. I would say that they are serious, [271] yes, but that they require a particularly

(Deposition of Carl G. Burdick.)

qualified man—if you see what I mean. I would not say that possibly, with a qualified man, that operation was any more serious than another one: but you have got to have a man that has had certain experience in that line. Is that clear?

Mr. *Burdick*: That is perfectly clear to me, doctor.

Q. 31. How does such operation for correction of such obstruction compare in probability of success and recovery of patient to operations for correction of other serious conditions of infancy and childhood?

Mh. *Burdeau*: I object to that, on the same ground.

A. You see, “other serious conditions” is indefinite.

Mr. *Schmidt*: I will withdraw the question. I see your point.

Q. 32. How does such operation compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced age or in cases of adults?

Mr. *Burdeau*: I object to that because it is a comparison of one definite operation with a class of operations which you describe as “serious” [272] in nature without specifying what operations you have in mind.

A. I would say that it is a more delicate operation to perform.

Mr. *Burdeau*: Could I intervene there just a minute. More delicate than what, doctor?

(Deposition of Carl G. Burdick.)

The Witness: That is the point. He spoke about conditions in older children. Now, for instance, you might say a strangulated hernia or volvulus or an acute appendix or an abdominal tumor, if you want to consider those different things as comparative I would say, just as I said before, that it is a more delicate operation to perform; the younger the baby is, the smaller the parts are, the more gently the tissues must be handled.

Q. 33. Let me phrase the question this way, then. How does such operation for intestinal obstruction due to volvulus, performed upon a child of a few days of age—five or six or eight days of age—compare with a similar condition, on children or more advanced ages?

A. I would say it was more difficult.

Q. 34. How does such operation compare, in probability of success and in probability of recovery of the patient, to a similar operation performed by surgeons upon [273] children of more advanced ages or upon adults?

A. You would not get a similar operation upon children of advanced age. If they were not operated upon, they would not live to an advanced age.

Mr. Burdeau: Could I ask a question just for my enlightenment?

Mr. Schmidt: Surely.

By Mr. Burdeau:

Q. 35. Is this condition which is the subject of this action a congenital condition? Is a child born that way? A. Yes.

(Deposition of Carl G. Burdick.)

Q. 36. Oh, then, that makes it easier to understand.

A. Yes. That is why I say that a child would not grow up unless he was operated on.

Mr. Burdeau: Then I understand.

By Mr. Schmidt:

Q. 37. That is, if such a child were not operated on, the child would die?

A. Yes, exactly.

Q. 38. To what extent, if you know, must a surgeon have specialized training, experience and skill in the performance of such operation for correction of intestinal obstruction in the newborn due to volvulus in order that such surgeon may be expected to perform such operation with high degree of probability that the condition [274] will be corrected and that the patient will recover?

Mr. Burdeau: I object to that, as calling for conclusions. But the answer goes in, of course?

The Witness: Do you want me to answer it?

Mr. Schmidt: Yes.

The Witness: Now give it to me over again.

(Q. 38 repeated by the reporter.)

A. Obviously, he must be a man who has had a considerable experience in that type of surgery.

Q. 39. What surgeon or surgeons of the State of New York, if you know, had had sufficient special and outstanding training and experience, on April 1, 1939, or thereabouts, to prepare and fit him or them to perform such operation for correc-

(Deposition of Carl G. Burdick.)

tion of intestinal obstruction in the newborn due to volvulus with high degree of probability that the patient will recover?

A. Do you mean you want me to name a group of men?

Q. 40. How many were there?

A. That is a large order. In the first place, I may not be familiar with all the men who are competent to do it.

Q. 41. How many would you know, would you say?

A. We are talking about Donovan; I would mention him. But I would mention perhaps a man by the name of Touroff. This is when; what year?

Q. 42. 1939.

A. I would mention a man by the name of Touroff, who is [275] up at Mt. Sinai. I might mention Charley Farr, who was over at St. Mary's for many years. There are not so many men who have had training preeminently fitting them for this type of operation in infants.

Q. 43. Did I understand you, doctor, to say that you mentioned Dr. Donovan in that?

A. Yes, I mentioned Donovan as chief of the Babies Hospital. And there may be one or two others. I do not think there would have been anybody else up there who would have had the training. You see, there are not so many hospitals in New York that you might say specialize in surgery of infants. You take, now, our service down at

(Deposition of Carl G. Burdick.)

Bellevue, I would not say that any of us down there had had enough experience in that type of surgery to make us eminently qualified—now, we could probably do it; but take myself; I would rather feel that somebody who had seen some of those cases was better qualified than I was.

Q. 44. Let me ask you, doctor, is Dr. Donovan, the plaintiff in this case, generally regarded among the members of the New York medical profession as a surgeon highly qualified to perform that type of operation?

A. I think he is, without any question.

Q. 45. Would you say that he was regarded by the medical profession as one of the most eminent in the city?

A. I would say so, yes.

Q. 46. Do you know how the medical profession regards to [276] eminence of Dr. Donovan in that special field insofar as the other surgeons of the United States are concerned?

A. I would say that Donovan had had as much experience in that type of surgery as anybody, to my knowledge, in this country. Now, in Boston, there is Ladd, at the head of the children's surgical service at the Children's Hospital; he is a little older than Donovan, but I don't believe he has seen any more of those cases than Donovan has. And some of the other men I am not so familiar with.

Q. 47. Have you had an opportunity in the course of your years of practice as a physician and surgeon to know from time to time the basis upon

(Deposition of Carl G. Burdick.)

which more prominent and higher ranking physicians and surgeons in New York City determine the fees which they charge for surgical operations?

A. I know what I charge; how I base it myself. I cannot tell what the other fellows do.

Q. 48. In the course of your own experience, as to the fees which you have charged from time to time for surgical operations, do you know how such fees have been generally regarded by the other members of the medical profession in New York City?

Mr. Burdeau: I object to that as utterly immaterial: going into the question of this doctor's compensation. [277]

The Witness: Give me the gist of that again.

Q. 48 repeated by the reporter.

A. "Such fees": I do not get you there. I don't know what that means.

Mr. Schmidt: I withdraw the question. I know what your objection is to it, Mr. Burdeau.

Q. 49. Have you had the opportunity as a result and in the course of your years of practice as a surgeon to learn and know the amount of fees arrived at by other prominent and able surgeons who give specialized attention to surgical conditions of infancy, for performing the operation for correction of intestinal obstruction in the newborn, due to malrotation of the intestines, with volvulus?

Mr. Burdeau: I object to that, as immaterial and irrelevant.

(Deposition of Carl G. Burdick.)

Mr. Schmidt: Not as to form, I take it.

Mr. Burdeau: No.

A. I would say that I have not had any definite knowledge of what other men charge: if that is what you mean.

Q. 50. Have you had the opportunity in the course and by virtue of your years of practice as a surgeon to learn and to know what has been the practice from [278] time to time of very prominent and very able surgeons of New York City, in fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and to go to distant points within the United States to perform such operations? A. Yes.

Q. 51. What has been such practice?

A. I would say that the practice depends on, first, the financial status of the patient or the family of the patient involved; the seriousness of the operation; and possibly the amount of time that a man has had to spend in preparing himself to become competent in that type of operation.

Q. 52. But would you say, doctor, that there would be a different fee ordinarily charged for an operation performed by a New York doctor in New York City, and that which he would charge when he had to go to some distant place?

A. Oh, surely: there is no question about that.

Q. 53. And would that be higher or lower?

A. It would be higher.

(Deposition of Carl G. Burdick.)

Q. 54. And what has been the general attitude, if you know, of the members of the medical profession towards such practice on the part of such surgeons with reference to approving or disapproving such practice, [279] that is, the practice of charging a higher fee for going to a distant point?

A. Oh, that is perfectly reasonable.

Q. 55. They approve or they disapprove it?

A. They approve it.

Q. 56. Now, doctor, have you had the opportunity in the course of your own professional practice to learn and to know what has been the custom from time to time of prominent and able New York surgeons in going to distant points and there performing specialized operations, on the matter of returning the patient to the care of local physicians and surgeons as soon after the operation as the patient indicates the termination of the need for specialized care? A. Yes.

Q. 57. They do that? A. Yes.

Q. 58. And was that the custom on or about April 1, 1939? A. Yes.

Q. 59. And what, if you know, has been the general attitude of the members of the medical profession relative to approving or disapproving such custom? A. They approve it.

Q. 60. Have you become familiar with and are you able based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the

(Deposition of Carl G. Burdick.)

reasonable value of the pro- [280] fessional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently qualified surgeon of the City of New York in performing a specialized surgical operation when you know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and [281] surgeon; the facts and circumstances which indicate

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whether the operation was or was not successful, and the facts and circumstances tending to indicate whether or not the patient should be reasonably expected to recover; knowing all that, doctor, are you from your past experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

A. Yes.

Q. 61. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and state of New York, after completion of the usual pre-college schooling, attended the College of Physicians and Surgeons of Columbia University from 1917 to 1920, graduated with the degree of M. D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assumed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-In Hospital in [282] New York City, and that during the first year of practice received appointments as assistant attending surgeon at Babies Hospital

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of New York City, and at St. Luke's Hospital of New York City, and at St. Luke's Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted to associate attending surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as assistant professor of surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting, and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full attending surgeon, which is the highest rank given at St. Luke's Hospital, *at St. Luke's Hospital*, and together with an associate surgeon was placed in charge and still is in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as consulting [283] surgeon at the Yonkers General Hospital at Yonkers, New York, at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to member-

(Deposition of Carl G. Burdick.)

ship in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice has been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the country, and that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference text book in use in the United States, and that he collaborated in panel discussions on intestinal obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan [284] established private offices in the City of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that Dr. Donovan thereafter continued and now continues to

(Deposition of Carl G. Burdick.)

carry on such specialized professional practice; and if it be further assumed that by April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants due to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified by his training and experience, to perform surgical operations for the correction of intestinal obstruction in the newborn due to malro- [285] tation of the intestine, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, the defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was apparent to the

(Deposition of Carl G. Burdick.)

physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed that, beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that following the taking of gastrointestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal conditions of such infant; and if it be further assumed that the said defendants in such action, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such newborn child, of the apparent necessity for such surgical operation and of the [286] seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physicians as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and

(Deposition of Carl G. Burdick.)

if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan's high qualifications and his unusual degree of experience, for correction of intestinal obstruction of the newborn child, then apparently needed by their infant son; and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. Donovan to perform such operation on their infant son; and if it be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent con- [287] dition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the

(Deposition of Carl G. Burdick.)

course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents did advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for [288] such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations for his employment and relying upon such representations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did

(Deposition of Carl G. Burdick.)

agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed, without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation; and if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did leave his New [289] York City office and his practice to be cared for by his agents and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939, and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of malrotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium, Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of

(Deposition of Carl G. Burdick.)

performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half [290] complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small

(Deposition of Carl G. Burdick.)

intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition of such infant was good at the completion of such operation; and if it be further assumed that such [291] infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it be further assumed that the said Dr. Donovan, after completing such operation in such manner and in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; that if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent nor-

(Deposition of Carl G. Burdick.)

mal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in a normal position; and if it be further assumed also that the said Dr. Donovan, for a substantial period of time after his return to New [292] York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extending his professional advice, as such specialist, to such attending physician;

Then, and under all of such circumstances what, in your opinion, would be the reasonable value of such professional services provided by the said Dr. Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to on the following grounds;

(1) The said hypothetical question includes and contains immaterial and irrelevant assumptions;

(2) The hypothetical question includes and contains assumptions based upon the unsworn statements of third persons not parties to this action;

(3) The hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action;

(4) The hypothetical question requires the wit-

(Deposition of Carl G. Burdick.)

ness to determine what facts are established [293] by the unsworn statements of other persons not parties to the action; and to take such facts as he so finds into consideration in forming his opinion; and

(5) Upon the ground that one of the assumptions contained in said hypothetical question is based upon a conclusion as to the mental operations of the defendants in employing the plaintiff.

Mr. Schmidt: What conclusion do you refer to, Mr. Burdeau? Maybe we can correct that portion of it.

Mr. Burdeau: (Reading) “* * * and if it be further assumed that said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan’s high qualifications and his unusual degree of experience.”

Mr. Schmidt: Let me amend the hypothetical question to read: “and such parents stating that they had made such decision because of Dr. Donovan’s high qualifications and his unusual degree of experience.”

Mr. Burdeau: In that case, the last objection is withdrawn. [294]

Mr. Schmidt: Now we will have the answer, doctor, if you will give it.

A. I should say somewhere between \$10,000 and \$15,000.

Mr. Schmidt: That is all.

(Deposition of Carl G. Burdick.)

Cross Examination

By Mr. Burdeau:

XQ. 62. Dr. Burdick, this condition about which you have been questioned is not a condition found only in infants born in New York or Boston, is it?

A. No, it is not.

XQ. 63. You would find it in Philadelphia?

A. Yes.

XQ. 64. St. Louis? A. Yes.

XQ. 65. New Orleans? A. Yes.

Mr. Schmidt: I will stipulate that.

Mr. Burdeau: Let me ask the question.

Mr. Schmidt: I thought I would save time.

XQ. 66. And wherever that condition arises it requires an operation? A. Yes.

XQ. 67. Do you mean to say that there are no qualified men to perform that operation in Philadelphia, St. Louis, Chicago, New Orleans? [295]

A. No, I do not mean to intimate that at all. I said that undoubtedly there are men throughout the country that I am not familiar with.

XQ. 68. That you are not familiar with?

A. Yes.

XQ. 69. So that because their reputations have not reached New York does not by any means indicate that there are not competent surgeons who can perform that operation?

A. Oh, absolutely.

XQ. 70. And in the hospitals in New York other

(Deposition of Carl G. Burdick.)

than Bellevue, there are babies' departments, are there not?

A. Well, there are not so many. Of course, I say the Babies Hospital is preeminent. There used to be St. Mary's Hospital for Children; now, they did not take babies—they started to two years ago. Now our service down at Bellevue is one of the best services for children, and why we do not see as many of these cases as they see at Babies Hospital I do not know. We have always wondered why we did not; but we just do not, that is all. Now, up at Mount Sinai, they have a good children's service. Offhand, it would be hard for me to think of another specialized hospital for babies. Do you see what I mean? All of these hospitals treat babies; but they do not get enough volume of work to get the experience. That is the point I am trying [296] to bring out.

XQ. 71. You have as I understand it emphasized the necessity of special experience and special training to enable a surgeon to perform this operation competently. A. Yes.

XQ. 72. Is that correct?

A. That is right.

XQ. 73. What do you mean by special experience and special training? Must he have had a large number of precisely the same kind of operations?

A. I would say that the more of those cases a man has seen the more competent he would be to perform any particular operation.

XQ. 74. Yes.

(Deposition of Carl G. Burdick.)

A. Or I would say almost this, that the more competent he would be in the first place to diagnose it—which is not so difficult; and in the second place to get in there and run up against various kinds of complications and be able to meet the situation in each one of them: do you see what I mean?

XQ. 75. I do. Doctor, are there other intestinal or abdominal conditions in newly born children that require operations?

A. Well, they are chiefly in the upper abdomen. Of course there are others. For instance, there is a lack of development of the lower bowel, where [297] you have what we call an imperfect anus: in other words, the baby's bowels cannot move. Now, that is a condition that we see.

XQ. 76. Is the condition that we have been talking about here, which I will briefly describe as intestinal obstruction due to volvulus, the only condition except the condition you have just mentioned—imperfect anus—that requires surgery in a newly born child?

A. No, I would not say that. But I would say that it was probably lesions in the upper abdomen. You take pyloricstenosis, and obstruction of the duodenum, and what we call nonrotation—which causes volvulus—I would say that those are the three things that you meet most frequently in infants.

XQ. 77. Those are of course mechanical defects in the intestines, are they not?

(Deposition of Carl G. Burdick.)

A. They are mechanical, yes.

XQ. 78. Are there not any pathological conditions that require surgery in a newly born child?

A. Yes; you might call those pathological.

Mr. Schmidt: Are you limiting this to the abdomen?

Mr. Burdeau: The intestines and the abdominal region. I withdraw the question, and rephrase it.

XQ. 79. I differentiate between a condition such as we have been talking about—obstruction due to volvulus— [298] and a condition of the intestines due to some diseases in the newly born child.

A. Well, you do not see many of those, due to disease in a newborn infant. In fact, I could not recall, offhand—

XQ. 80. I do not, myself. I am asking you.

A. —anything that you see in a baby.

XQ. 81. Then the surgeon who holds himself out as a specialist in the branch of surgery concerned with intestinal surgery in newly born children has only about one operation he can look for, and that is the operation to relieve obstruction due to volvulus; is that it?

A. I do not quite get your inquiry. Do you mean to say that one man poses as only operating in that condition?

XQ. 82. I am trying to get you to tell me any other conditions of a first-class, well experienced child's surgeon would ordinarily be prepared to encounter?

(Deposition of Carl G. Burdick.)

A. A surgeon who has had you might say a large and extensive experience in children's surgery would naturally be able to cope with various conditions in children. But I would say this, that there are certain men who have had more experience along certain lines. Now, for instance, take myself——

XQ. 83. I understand all that.

A. Take myself, I have done a lot of cleft palate sur- [299] gery; I have probably done as much cleft palate surgery as anybody in New York City. Now, while I know a moderate amount about children's surgery, I would say that I had had an unusual experience in cleft palate surgery. That is what I am trying to bring out.

XQ. 84. To pursue my line of examination; cleft palate is not the only abnormal condition that you would find in a person's mouth?

A. Absolutely not.

XQ. 85. That is what I am trying to get at with respect to an infants intestines and abdomen. This condition of obstruction due to volvulus is not the only abnormal condition that a surgeon would expect to find there?

A. Absolutely not. There is no question about that.

XQ. 86. So that a man engaged in child's surgery can look for many other conditions requiring surgery; is not that correct?

A. Oh, yes; that is perfectly correct.

(Deposition of Carl G. Burdick.)

XQ. 87. And those conditions require the opening of the abdomen wall? A. Yes.

XQ. 88. That is a serious operation, too, isn't it?

A. I suppose it really is.

XQ. 89. I mean to say, doctor, this particular operation involved in this case is not the only serious operation that can be performed—— [300]

A. Oh, absolutely not.

XQ. 90. Throughout the United States infants are born every day that require abdominal surgery, intestinal surgery? A. Yes.

XQ. 91. And, somehow or other, there are competent men on hand to do it; is not that so?

A. I expect there must be. On the other hand, I would say that there are more competent men in the larger centers, like New York, Boston, Philadelphia, St. Louis, Chicago, and so on.

XQ. 92. Well, the population is bigger in those towns?

A. The men there are the men who see enough cases to get the experience.

XQ. 93. Right.

A. That is the point.

XQ. 94. But do you think that the men outside of New York—from Boston—lose more cases through surgery than the men in New York?

A. Now, listen: I am not holding New York up as a paragon.

XQ. 95. I will withdraw it. Will you repeat the factors you would take into consideration in form-

(Deposition of Carl G. Burdick.)

ing your opinion of the reasonable value of another surgeon's services?

A. I have forgotten what I said before. But I would say that it depended on the seriousness of the oper- [301] ation, the technical skill which it required to perform the operation, and the financial ability of the patient's parents to pay. When a person comes in here I tell them an operation is worth what you are able to pay for it.

XQ. 96. That was not the order in which you stated those factors when you answered the question on direct examination.

A. I don't remember how I stated it.

XQ. 97. Let me refresh your memory then. Is it not a fact that you said that the first consideration was the financial standing of the patient?

A. I don't remember.

XQ. 98. I will ask you now, then, doctor: is not that the first consideration—didn't you just say so?

Mr. Schmidt: I object to the last part. He did not say so.

Mr. Burdeau: No?

Mr. Schmidt: I object to it as to form.

Mr. Burdeau: This is cross-examination. I can lead him all I want to.

Mr. Schmidt: But I object to the form.

The Witness: What is the question again?

A. What do I base it on?

XQ. 99. No, sir. I asked you if that was not the most important factor. [302]

A. The financial ability of a patient to pay?

(Deposition of Carl G. Burdick.)

XQ. 100. Yes.

A. Naturally, if a patient has not got any money we operate on those patients for nothing.

XQ. 101. I know your profession——

A. There are a certain number of patients who are able to pay a very moderate fee. There are other patients who are able to pay what you might call a good fee. Now, that all depends on their capacity; their ability to pay.

XQ. 102. Those are the important and essential factors that you would take into consideration in any case that was submitted to you for an opinion as to the reasonable value of another surgeon's services?

A. For instance, I would not charge as much—in a wealthy patient, I would not charge as much for a circumcision as I would for this type of operation—going into the abdomen.

XQ. 103. That is not what I am asking you. I was just asking you an impersonal question, in a case like this, where the reasonable value of another surgeon's services are being inquired into. And you have mentioned three factors to be taken into consideration.

A. Yes. I would say a part of it is the financial capacity to pay. [303]

XQ. 104. In the hypothetical question submitted to you a number of the achievements and distinctions of Dr. Donovan are enumerated. He served six months as assistant resident surgeon at Mary Mc-

(Deposition of Carl G. Burdick.)

Clelland Hospital at Cambridge; he served two years' surgical internship at St. Luke's Hospital of New York City; He served four months as resident surgeon at Lying-In Hospital in New York City; and during the first year of practice received appointment as assistant attending surgeon at Babies Hospital in New York City and St. Luke's Hospital in New York City. Just for illustration: are those factors that you have taken into consideration in forming your opinion of Dr. Donovan?

A. Not all of that preliminary stuff, no. That is work that practically all of us have had.

XQ.105. Any doctor who has become recognized as a surgeon has generally had similar experience?

A. You have to have that experience whether you get anywhere or not.

XQ.106. Would the fact that Dr. Donovan was elected to membership in the American Surgical Association be a factor, with you, in forming your opinion of the reasonable value of his services?

A. I would say that—and I say this in all modesty—he was an outstanding surgeon to be elected to membership in the American Surgical Association. Now, I [304] would not say that because he is a member of the American Surgical Association he is preeminently qualified to do this particular operation.

XQ.107. In other words, the fact of his membership would not add to the value of his services in a given case?

(Deposition of Carl G. Burdick.)

A. I would say that all of these various memberships bring out the fact that Donovan is an outstanding surgeon.

XQ. 108. But that particular fact would not have any weight with you one way or the other in a given case in forming an opinion as to the value of his services?

A. Well, of course you are coming to the meat of the cocoanut a little later on. Let us pass over that for the time being.

XQ. 109. Why?

A. I know, but you are coming to the things that do qualify him.

XQ. 110. I am not going to come to that at all.

A. I know, but——

XQ. 111. My purpose in asking you these questions is not to attack your testimony.

A. I understand that.

XQ. 112. But to show that this question itself is padded up with a lot of irrelevant matter.

A. I think that every lawyer that writes a hypothetical question pads it to the Queen's taste; I will say that. [305]

XQ. 113. Just one more question and we will quit this line. Would the fact that Dr. Donovan wrote a chapter which has been published in Christopher's Textbook of Surgery influence your opinion as to the value of his services?

A. I should think so, yes.

XQ. 114. Doctor, let us assume that a surgeon who has not had the distinction and honors that

(Deposition of Carl G. Burdick.)

Dr. Donovan has achieved, had performed this operation on the child in this case, with the same result, would the fact that he was without the reputation of Dr. Donovan but had done the same job make any difference in your opinion as to what his services were worth?

Mr. Schmidt: I object to the question in form, on the ground that it calls for a conclusion, first; and, secondly, it presupposes facts not in evidence in this case.

The Witness: Your question is, would a surgeon without all of these qualifications——

Mr. Burdeau: Will you please read the question to the witness?

(XQ. 114 repeated by the reporter.)

A. I would say of course the reason why these people—now, I don't know whether you are going to let me expatiate, or not; usually you don't. These people picked out Donovan because they felt that he was the [306] *the* best surgeon they could get.

XQ. 115. All right; I am going to interrupt you there to ask you how you know that.

A. I assume that anybody that tries to get somebody to come from New York, to fly down to Tucson, that they are doing that because they feel that there is not somebody nearer by that is just as competent: because it would be perfectly reasonable that if you could get somebody in a nearby town that was right on the job, that would be there within an hour, it seems to me it is perfectly reasonable to assume that

(Deposition of Carl G. Burdick.)

if you felt that man was just as competent that you would get him rather than to try to get a fellow like Donovan from New York.

XQ. 116. All right. Dr. Burdick, would you, in forming an opinion as to the reasonable value of the services of Dr. Donovan on the occasion of his visit to Tucson—which is involved in this case—take into consideration that he was absent from his office, and as the hypothetical question puts it, he had to leave his affairs to be carried on by his agents, and so on, or substitutes: would that be a factor in estimating the value of his services?

A. The fact that he left his office for—I don't know how long he was away, four or five days?

[307]

XQ. 117. Two days.

A. Well, of course I would not say that that was as much a factor as some other things.

XQ. 118. It is mentioned in the hypothetical question.

A. It is all right: if a man goes away from his office for a couple of days, that is worth something, there is not any doubt about that.

XQ. 119. Is not the only question there the value of his services in going to and from the place where he operates and the services rendered in operating?

A. Well, you might take into consideration the fact that he flew down there and flew back: there is a certain amount of risk in doing that sort of thing.

(Deposition of Carl G. Burdick.)

XQ. 120. I did not ask that question, doctor. My point is simply this. Is he entitled to charge both for the services he rendered in Tucson and to charge for work he was unable to do because he was in Tucson?

A. Well, I would say you would sort of lump those things together.

XQ. 121. You would? He is trying to be fully paid for his time and services from the time he left New York until the time he got back; you understand that? Now, the hypothetical question assumes that he is entitled to compensation for the time he was not in New York.

Mr. Schmidt: I must object to that in form, because it does not assume any such thing. [308] It assumes that while he was away from New York he might well not have earned some fees.

Mr. Burdeau: Well.

Mr. Schmidt: He does not ask to be paid because he was not here.

Mr. Burdeau: That is a pure speculation; which does not cure the defect in the hypothetical question.

XQ. 121. You would not say that he was entitled to work he did and work he could not do?

A. No, I don't think I would. I don't think I would.

XQ. 122. Doctor, I will have to ask you a little about your personal relations with Dr. Donovan. You know him very well, of course?

A. Yes, I know him pretty well. I would not

(Deposition of Carl G. Burdick.)

say that he was a close friend of mine; but he—well, I have known him for a long time. I have known him for fifteen or twenty years.

XQ. 123. Have you ever had any professional associations with him?

A. No, never.

XQ. 124. How did you come to be a witness in this case?

A. I haven't any idea. I told my secretary, "I don't know what they got me into this thing for."

XQ. 125. Who asked you to come into it?

A. Donovan spoke to me about it. [309]

XQ. 126. Did he speak to you on the telephone or by a visit?

A. He came up to see me.

XQ. 127. And told you considerably about the case?

A. He told me about the case, and wanted to know if I thought that was a reasonable fee. I told him I certainly did.

XQ. 128. What did he ask you was a reasonable fee? Just state the figure.

A. I have forgotten. I think he asked me this: I think he said, "What would you charge for a thing like that?" I think he said that.

XQ. 129. And you, of course, not being a man of great experience in that particular branch of child surgery—did you tell him what you would charge for a similar operation?

A. I told him that I thought that they had gotten him down there——

(Deposition of Carl G. Burdick.)

XQ. 130. No. I am asking you what you told him you would charge for that kind of operation.

A. All right. I did not say what I would charge. I said, "If I were in your place I would charge"—I think I said to him what I have said here,—between \$10,000 and \$15,000.

XQ. 131. I am going to ask you now to explain, please, how you came to tell a man what his charge should be for a branch of surgery regarding which you say you yourself are not a specialist. [310]

A. Well, I would say that irrespective of the type of surgery that a man performs, if he was eminently qualified to perform that particular operation I would say that it was a reasonable fee.

XQ. 132. And in forming your opinion about that, doctor, you as I understand it have made a prominent factor the financial condition of the patient or the patient's parents?

A. Absolutely.

XQ. 132a. What did you know about the financial condition of the patient's parents?

A. All I know is that Donovan said in the first place when they called up they said that money was no object.

XQ. 133. Have you read this question?

A. I have. But I cannot repeat it.

(Note: There is no No. 134 in the deposition.)

XQ. 135. He did not tell you that Mr. Jeffcott said that, did he?

(Deposition of Carl G. Burdick.)

A. No, he told me—I think some doctor called him up.

XQ.136 So the hypothetical question attributes that statement to the doctors there; is that correct?

A. I don't know. I cannot remember the hypothetical question. I am trying to tell you my conversation with Donovan, if you will let me finish.

XQ.137. I am trying to get it.

A. All right; let me finish it. This doctor called [311] up and said—first, Dr. Donovan wanted them to come up to New York. Well, they would not do that; they wanted Donovan to come down there; so money was no object. I think Donovan was down at Atlantic City. He got a plane and went down there; he got down there, and I think he went in, and he said there were four nurses there; I think they were flying milk on from San Francisco or Los Angeles or something—anyway, the situation was that of a family of abundant means.

XQ.138. Now if you assume that the total assets of the family consist of a ranch—a stock raising ranch—of the approximate value of \$150,000, but which is mortgaged for \$50,000, and that the ranch itself is not paying and has not paid any income, and that the total income of the child's parents per year was \$5,000, would that make any difference to you?

A. I would wonder, first—I would say, "Who is paying for all these nurses? And who is paying for this milk that is being flown in?"—I don't know from where: California or some place.

(Deposition of Carl G. Burdick.)

XQ. 139. Then you think that the importation of milk and the four nurses, are factors that enter into it?

XQ. 140. And Dr. Donovan told you all that?

A. He told me that, yes.

XQ. 141. You have not yet answered my question as to whether [312] or not, assuming the facts that I have stated as to the net worth of the parents and their annual income of \$5,000, that that would make any difference in your own estimate of the value of Dr. Donovan's services.

Mr. Schmidt: I object to that as to form, on the ground that there is no basis laid for the facts stated in the question.

A. I would say that anybody with an income of \$5,000 a year did not have any right to expect a fellow to fly down from New York City to operate on their baby.

XQ. 142. In other words, that a man would not go from New York to Tucson say for \$500 expenses and \$1000 a day.

A. I know very well I would not.

XQ. 143. That is not the question. Do you think anybody else would be more charitable?

A. Now, listen——

XQ. 144. Now, you are bringing yourself into this, when you had no right to. I am asking you about the value of somebody else's services.

A. All right.

XQ. 145. Do you mean to tell me that no New

(Deposition of Carl G. Burdick.)

York surgeon of prominence would consent to go from New York to Arizona for \$500 expenses and \$1000 a day fee, under any circumstances?

A. Would you as a lawyer? [313]

XQ. 146. I would be tickled to death to do it. I wish to goodness I could get a few cases like that a year.

A. You would be smart enough to get it in advance. That is where Donovan made his mistake—in not pinning those fellows down.

XQ. 147. You have not yet answered my question. A. What is the question?

XQ. 148. The question is: Do you believe that there is no doctor—qualified surgeon—who would refuse to go from New York to Tucson for \$500 expenses and \$1000 a day?

A. I don't know whether there is or not.

Mr. Burdeau: That is all.

Mr. Schmidt: That is all.

CARL G. BURDICK.

Subscribed by Carl G. Burdick before me this day of December, 1941.

ALBERT GERBER,

Notary public.

Adjourned by consent of the attorney for the plaintiff and counsel for the defendants to Wednesday, December 10, 1941, at 2 o'clock p. m. to meet at the office of Dr. Fenwick Beekman, No. 121 East 60th Street, New York, N. Y. [314]

[Title of District Court and Cause.]

State of New York,
County of New York—ss.

Deposition of Fenwick Beekman taken pursuant to the annexed notice dated at Tucson, Arizona, the 12th day of November, 1941, as a witness on behalf of the plaintiff in the above-entitled action, before Albert Gerber, a duly appointed and qualified notary public of the state of New York for the county of New York, at the office of said Fenwick Beekman, No. 121 East 60th Street, Borough of Manhattan, City, County and State of New York, beginning at 2 o'clock p. m. on the 10th day of December, 1941, to which time and place the taking of said deposition was adjourned by consent of counsel for the respective parties herein. [315]

DEPOSITION OF FENWICK BEEKMAN

Fenwick Beekman, of lawful age, duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Schmidt:

Q. 1. Please state your name.

A. Fenwick Beekman.

Q. 2. Where do you reside?

A. 138 East 64th Street, New York City.

Q. 3. What is your profession?

(Deposition of Fenwick Beekman.)

A. Surgeon.

Q. 4. Where is your office for the practice of your profession?

A. 121 East 60th Street.

Q. 5. When and where have you been admitted to practice as a surgeon?

A. New York State, I think in 1909. I graduated in 1907.

Q. 6. What schools did you attend, other than college, in preparing for the practice of such profession?

A. The University of Pennsylvania Medical School.

Q. 7. How long were you in attendance at that school? A. Four years.

Q. 8. What degrees, if any, did you receive from that school?

A. M. D. Doctor of Medicine.

Q. 9. When was that degree conferred upon you? A. In June, 1907.

Q. 10. Did you have any other and special training which was designed to fit and prepare you for the practice [316] of such profession?

A. I did. I served a year in pathology in St. Luke's Hospital, and eighteen months in surgery at St. Luke's Hospital, New York City.

Q. 11. That is what is ordinarily termed an interne? A. Interne.

Q. 12. Are you a member of any professional organizations? A. I am.

(Deposition of Fenwick Beekman.)

Q. 13. What organizations are they?

A. I am first of all a diplomat of the American Board of Surgery; the American Board of Plastic Surgeons; I am a member of the American College of Surgeons; I am a member of the American Association of Oral and Plastic Surgery; I am a member of the American Association of Traumatic Surgeons; the New York Surgical Society; the American Medical Association; the New York Academy of Medicine.

Q. 14. Is admission to membership in any of those organizations you have named dependent upon the demonstration of special professional qualifications or accomplishments? A. Yes.

Q. 15. Which one or ones?

A. The American Board of Surgery; the American Board of Plastic Surgery; and the American College of Surgeons.

Q. 16. Is membership in the American College of Surgeons limited, doctor?

A. I do not know. No, it is not limited: the American [317] College of Surgeons is not limited.

Q. 17. Will you please state fully the nature and extent of your past experience in the practice of your profession.

A. I have been a surgeon at the Hudson Street Hospital, which is a part of New York Hospital; the Lincoln Hospital; the City Hospital. I am now visiting surgeon, Children's Surgical Service, Bellevue Hospital—in charge; I am now visiting sur-

(Deposition of Fenwick Beekman.)

geon of the Hospital for the Ruptured and Crippled; I am now consulting pediatric surgeon at Fitkin Memorial Hospital in New Jersey; I am now consulting surgeon to Lincoln Hospital; and I am attending surgeon, pediatric division, Midtown Hospital.

Q. 18. You have been practicing surgery ever since your admission? A. I have.

Q. 19. To what extent, in the course of your professional training and practice, have you become familiar with surgery incident to intestinal obstruction in the newborn due to volvulus?

A. I have seen many cases of this condition.

Mr. Burdeau: Just to clarify the answer, may I ask Dr. Beekman if by saying he has seen many cases, how many cases he personally has operated on?

The Witness: Yes. Perhaps ten. [318]

Mr. Burdeau: That is all I wanted to ask.

Q. 20. To what extent in the course of your professional training and practice have you become familiar with the general surgical conditions of infancy and childhood?

A. For the last twenty-two years I have been connected as visiting surgeon of the children's surgical service at Bellevue Hospital, which has seventy-five beds, with all surgical cases.

Q. 21. You testified before, did you not, doctor, that you were the chief surgeon of Bellevue?

A. Yes, of the children's surgical service.

(Deposition of Fenwick Beekman.)

Q. 22. Of the children's surgical service?

A. Yes.

Q. 23. Can you state, doctor—and, if you can, please state—how the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compares in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood.

Mr. Burdeau: I object to that as indefinite, and as comparing a known condition with a variety of undescribed conditions.

Mr. Schmidt: Will you answer, doctor?

The Witness: Will you repeat your question?

(Q. 23 repeated by the reporter.)

A. You need a particular knowledge of the embryology [319] and development of the intestinal tract; you need a particular knowledge of the infant as an individual—physical make-up of the infant as an individual; and you need particular training and experience to learn and know the treatment of the condition.

Q. 24. Doctor, is it your opinion, based upon your long years of experience and practice, that without that knowledge it would be highly hazardous for a surgeon to perform such operation?

Mr. Burdeau: I object to that as speculative; not subject to expert opinion. A. It is.

Q. 25. How does such operation for correction of such obstruction compare in probability of suc-

(Deposition of Fenwick Beekman.)

cess and recovery of patient to operations for the correction of other serious conditions of infancy and childhood?

Mr. Burdeau: I object to that, on the ground that it is speculative; and, second, on the ground that it is a comparison of a given condition—obstruction due to volvulus—with a limitless range of other conditions.

A. I would say it was a very serious condition—if that answers it.

Q. 26. What would you say as to the probability of success in recovery of the patient compared with other serious operations?

Mr. Burdeau: I object to that as speculative [320] and as calling for a prognosis of a particular condition with a limitless range of other conditions.

The Witness: May I have the question?

(Q. 26 repeated by the reporter.)

A. That is a very difficult question to answer——

Mr. Burdeau: I should think so.

A. (Continued) ——because there are so many other different operations that might be of serious conditions. All I can say is that it is one of the most serious conditions.

Mr. Burdeau: Well, that is all right; but that is not what you were asked.

The Witness: What is that?

Mr. Burdeau: That is not what you were asked.

(Deposition of Fenwick Beekman.)

Q. 27. Well, doctor, would you say that an operation on a newborn infant for intestinal obstruction due to volvulus is one of the most serious operations that such infant could have?

Mr. Burdeau: I object to that as leading.

A. I think it is one of the most serious that you can operate upon.

Mr. Burdeau: You know that is as to form.

Mr. Schmidt: Yes.

Q. 28. Let me ask you, doctor, what operation on a newborn infant having to do with intestinal obstruction would you deem the most serious? [321]

The Witness: May I have that again?

(Q. 28 repeated by the reporter.)

Mr. Burdeau: I object to that, on the ground that it is irrelevant, immaterial, and not directed to the condition involved in this case.

A. I should say that some of the atresia obstructions of the intestines would be.

Q. 29. By atresia, does that cover volvulus?

A. Obstruction would cover volvulus. Atresia would be an obliteration of the intestinal lumen.

Q. 30. How does such operation for intestinal obstruction due to volvulus compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced years or in cases of adults?

Mr. Burdeau: I object to that as irrelevant and immaterial; second, as speculative, and as calling for a comparison between a given condition and an

(Deposition of Fenwick Beekman.)

unlimited range of unspecified conditions.

The Witness: Can I have the question again?

(Q. 30 repeated by the reporter.)

A. All intestinal operations on newborn infants are very much more serious and difficult than in older individuals.

Q. 31. Doctor, how would an operation on a newborn infant for intestinal obstruction due to volvulus compare [322] with an intestinal operation on a child of more advanced years, or an adult?

Mr. Burdeau: I object to that, as immaterial and irrelevant.

A. If this can be off the record: I think my answer covered it.

Q. 32. Do you mind covering it again?

A. Any operation on an infant having to do with the intestines is far more serious than an operation on an older child.

Q. 33. How does such operation, that is on a newborn infant, compare in probability of success and in probability of recovery of the patient, to an intestinal operation performed on a child of more advanced years or upon an adult?

Mr. Burdeau: I object to that as immaterial and irrelevant and as speculative.

The Witness: May I have the question?

(Q. 33 repeated by the reporter.)

A. There is less chance of recovery, I should say.

Q. 34. Doctor, to what extent, if you know, must

(Deposition of Fenwick Beekman.)

a surgeon have specialized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover? [323]

Mr. Burdeau: I object to that as speculative in all respects.

Mr. Schmidt: Mr. Burdeau, won't you reserve your objections: just make your objections as to form? The others are reserved to you. We are just filling the record up with all these objections, which are going to be taken at the trial anyhow. I mean it is understood that you reserve all rights to object to the relevancy and so forth. If you don't mind.

Mr. Burdeau: I still want to object to some of them on the record.

Mr. Schmidt: All right.

The Witness: May I have it repeated?

(Q. 34 repeated by the reporter.)

A. He must have knowledge of the condition; he must have knowledge of the embryological development; he must have experience in having done other cases and seen the variations that might occur in them. Is that the answer; does that answer the question?

Q. 35. I think so. What surgeon or surgeons of the State of New York, if you know, had had suf-

(Deposition of Fenwick Beekman.)

ficient special and outstanding training and experience on or about April 1, 1939, to prepare and fit him or them to perform such operation for correction of intestinal obstruction in the newborn due to volvulus with high degree of probability that such operation would cor- [324]rect such condition and that the newborn patient would recover?

Mr. Burdeau: I note the usual objection.

A. I think the man who has done the most work in New York State has been Dr. Donovan.

Q. 36. That is Dr. Edward J. Donovan?

A. Dr. Edward J. Donovan.

Q. 37. The plaintiff in this case?

A. The plaintiff in this case. There are others, like Dr. Peterson, who is connected with the Post-Graduate Hospital. And there is a young man in my service at Bellevue, named Dr. John E. Sullivan.

Q. 38. But, from your own knowledge, in this state, where would you place Dr. Donovan relative to skill in the performance of such an operation among those whom you have named?

A. I think I would place him at the head.

Q. 39. Doctor, do you know what surgeons in the United States were generally regarded by the members of the medical profession of the United States, on or about April 1, 1939, as being eminently qualified to give specialized attention to surgical conditions of infancy and childhood?

Mr. Burdeau: I object to that, on the ground

(Deposition of Fenwick Beekman.)

that it is irrelevant and immaterial; and the only question here is the reasonable value of the services rendered by Dr. Donovan.

A. Dr. William Ladd of Boston has been a leader in intes- [325] tinal surgery in infancy, and Dr. Downes, until he was sick, was one of the foremost; Dr. Boling, who died some years ago, was one of the leaders in this thing; and Dr. Donovan has followed them.

Q. 40. Those doctors you have named, from your own knowledge, are those whom the medical profession deem best qualified to perform this type of operation that we have described in this examination? A. They are.

Mr. Burdeau: I object to that as hearsay.

Q. 41. Doctor, have you had opportunity in the course of your years of practice as a surgeon to know from time to time the basis upon which the more prominent and higher ranking surgeons in New York City determine the fees which they charge for surgical operations? A. I have.

Q. 42. Have you had opportunity in the course of your practice to know the amount of fee which has been charged from time to time by some of the more prominent and able surgeons of New York City for specialized operations which they have performed? A. I have.

Mr. Burdeau: I object to that as immaterial and irrelevant, and as not directed to services of the kind rendered by Dr. Donovan.

(Deposition of Fenwick Beekman.)

Q. 43. Have you had the opportunity as a result of and in [326] the course of your years of practice as a surgeon to learn and know the amount of fees charged by prominent and able surgeons who give specialized attention to surgical conditions of infancy for performing the operation for correction of intestinal obstruction in the newborn due to malrotation of the intestines, with volvulus?

A. I would not be qualified to answer that question, because it is too rare a condition, and prices have not been exposed to my knowledge.

Q. 44. So that the condition of an infant suffering with an intestinal obstruction due to malrotation of the *intestinal obstruction due to malrotation of the* intestines with volvulus, is a rare condition? A. Oh, it is a rare condition.

Q. 45. Have you had opportunity, in the course and by virtue of your years of practice as a surgeon, to learn and know what has been the practice from time to time of prominent and able surgeons of New York City for fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and to go to distant points within the United States to perform such operations? A. Yes, I have.

Q. 46. What has been such practice?

A. I think the fees are judged on the time, the surgical [327] condition, the experience and knowledge required and also, as you know, the ability of

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the individual to pay the fees, as life is of relative value to us; in other words, the life of a poor man is just as valuable to him as that of a rich man, but, as he has a relatively smaller income, the fees demanded of him would be less than those demanded of a man with a relatively higher income.

Q. 47. Getting back to my question of the practice of charging fees by New York surgeons who are asked to leave the city and go to distant places of the United States; do they charge higher, or smaller, fees, for doing that? A. Higher fees.

Q. 48. And that is the practice?

A. That is the practice..

Q. 49. What has been the general attitude, if you know, of the members of the medical profession towards such practice on the part of such surgeons, with reference to approving or disapproving such practice?

A. I will have to have that repeated.

Q. 50. Let me put it in shorter form. Does the medical profession approve or disapprove such practice? A. They approve of it.

Q. 51. Doctor, have you had the opportunity in the course of and by virtue of your professional practice to learn and know what has been the custom from time to [328] of prominent and able New York surgeons in going to distant points and there performing specialized operations, on the matter of returning patients to the care of local physicians and surgeons as soon after the operation

(Deposition of Fenwick Beekman.)

as the condition of the patient indicates the termination of the need for specialized care?

A. Yes, I think so.

Q. 52. What was the custom, on or about April 1, 1939?

A. The practice is not to leave until the patient apparently is on the way to recovery.

Q. 53. And, when the need for specialized care is over, is it the practice to turn them over to the care of their own surgeon and local doctor?

A. It is.

Q. 54. Is that the custom and practice approved by the medical profession? A. It is.

Q. 55. Have you become familiar with and are you able based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the reasonable value of the professional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently qualified surgeon of the City of New York in performing a specialized surgical operation when you [329] know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such

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surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and surgeon; the facts and circumstances which indicate whether the operation was or was not successful, and the facts and circumstances tending to indicate whether or not the patient should be reasonably expected to recover:

Knowing all that, doctor, are you from your past [330] experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

A. Yes.

Q. 56. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and state of New York, after completion of the usual pre-college schooling, attended the College

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of Physicians and Surgeons of Columbia University from 1917 to 1920, graduated with the degree of M. D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assumed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-In Hospital in New York City, and that during the first year of practice received appointments as Assistant Attending Surgeon at Babies Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted [331] to Associate Attending Surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as Assistant Professor of Surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he

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was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full Attending Surgeon, which is the highest rank given at St. Luke's Hospital, at St. Luke's Hospital, and together with an associate surgeon was placed in charge and still is in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as Consulting Surgeon at the Yonkers General Hospital at Yonkers, New York at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to membership in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and [332] assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice has been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the country, and

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that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference textbook in use in the United States, and that he collaborated in panel discussions on intestinal obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan established private offices in the city of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that Dr. Donovan thereafter continued and now continues to carry on such specialized professional practice; and if it be further assumed that by [333] April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants due

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to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified, by his training and experience, to perform surgical operations for the correction of intestinal obstruction in the newborn due to malrotation of the intestine, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, the defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was ap- [334] parent to the physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed that, beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that following the taking of gastrointestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal condition of such infant; and if it be further assumed that the said defendants in such

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action, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such newborn child, of the apparent necessity for such surgical operation and of the seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physician as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as [335] the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation and such parents stating that they had made such decision because of Dr. Donovan's high qualifications and his unusual degree of experience for the correction of intestinal obstruction of the newborn child, then apparently needed by their infant son, and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. Donovan to perform such operation on their infant son; and if it

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be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent condition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such [336] parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents did ad-

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advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to [337] them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations for his employment and relying upon such representations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed, without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation; and if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did

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leave his New York City office and his practice to be cared for by his agents and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939 and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of malrotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns; that the lower half of this intestine was blue and

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completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in [339] the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition of such infant was good at the completion of such operation; and if it be further assumed that such infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it

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be further assumed that the said Dr. Donovan, after completing such operation in such manner and in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, [340] for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; and if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent normal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position; and if it be further assumed also that the said Dr. Donovan, for a substantial period of time after his return to New York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extend-

(Deposition of Fenwick Beekman.)

ing his professional advice, as such specialist, to such attending physician:

Then and under all such circumstances what, in [341] your opinion, would be the reasonable value of such professional services provided by the said Dr. Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to on the following grounds:

(1) The said hypothetical question includes and contains immaterial and irrelevant assumptions;

(2) The hypothetical question includes and contains assumptions based upon the unsworn statements of third persons not parties to this action;

(3) The hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action; and

(4) The hypothetical question requires the witness to determine what facts are established by the unsworn statements of other persons not parties to the action, and to take such facts as he so finds into consideration in forming his opinion.

A. I should say about \$10,000 to \$15,000.

Cross Examination

By Mr. Burdeau:

XQ. 57. I understand your last answer to be that your [342] opinion of the reasonable value of Dr. Donovan's services was from \$10,000 to \$15,000. A. Yes.

(Deposition of Fenwick Beekman.)

XQ. 58. Is there any more definite figure that you can give as an answer to that question?

A. No, I do not think there is.

XQ. 59. Under what circumstances would the services be worth \$10,000?

A. I put \$10,000 to \$15,000 because I do not know the financial condition of the individuals involved.

XQ. 60. Then if I should ask you under what conditions the services would be worth \$15,000, your answer would be the same; is that it?

A. It would be.

XQ. 61. So that the spread of 50 per cent of \$10,000 would be dependent entirely upon the financial conditions of the patient or its responsible parents? A. Yes.

XQ. 62. Those employing the surgeon?

A. Yes.

XQ. 63. I infer from a remark you made that you have talked about this case with Dr. Burdick. Is that correct?

A. No, I have not. I have known Dr. Burdick, though: I worked with him for many years.

XQ. 64. Am I mistaken in my understanding that you said that you understood that Dr. Burdick was very much disturbed about that hypothetical question? [343]

A. You made a remark earlier in the thing about having a hard time; and I just was joking with you in making a remark about Dr. Burdick.

(Deposition of Fenwick Beekman.)

XQ. 65. I know; but what caused you to make such a remark: that you understood that Dr. Burdick——

A. Because I know he always gets fussed up when he is questioned by lawyers.

XQ. 66. He has not mentioned this question?

A. No, not to me.

XQ. 67. Have you talked this case over with Dr. Donovan?

A. I had a telephone talk with Dr. Donovan, when he asked me if I would be willing to testify for him.

XQ. 68. You have not talked it over across the table?

A. No, I have not seen Dr. Donovan since he called me up——, yes, he came in to my office: he called me upon the 'phone, and made a date, and came to the office and told me about the case.

XQ. 69. Have you ever heard of a case of this kind being performed by a surgeon of comparable skill and experience for less than \$10,000?

A. What do you mean: a case of exactly this kind?

XQ. 70. I am speaking, always, of a case such as involved here, as I understand it intestinal obstruction due to volvulus—whatever that means?

A. What is the question?

XQ. 71. I ask you if you have heard of a case of this particular kind, that is, intestinal obstruction due to [344] volvulus; where the surgeon operated for a fee of less than \$10,000?

A. Yes.

(Deposition of Fenwick Beekman.)

XQ. 72. How much less, doctor?

A. It has been done—I have done it myself for nothing; and I have done it for \$300.

XQ. 73. Then, to be fair about this thing, I want you to explain that that was due because of the financial condition of the patient; is that it?

A. Absolutely.

XQ. 74. And it ranges all the way from \$300?

A. Absolutely.

XQ. 75. In the course of your testimony, you were asked what qualifications a surgeon had to have for this kind of an operation. A. Yes.

XQ. 76. If my notes are correct, you said he must have particular knowledge of the embryology of the intestinal tract. Now, any surgeon who undertakes to perform an operation of this kind must have that knowledge, whether he is prominent, or not, as a matter of fact?

A. Yes, that is the fact

XQ. 77. What did you mean when you said that he must also have particular knowledge of the infant as an individual?

A. I mean that individual people who do not do much [345] surgery of infancy have not the knowledge or the skill in handling the delicate tissues or in handling the after care of the individual.

XQ. 78. I understood you to say that a surgeon must have more than the ordinary experience in this particular kind of operation, to justify the belief or the expectation that this operation would be successful; is that correct? A. It is.

(Deposition of Fenwick Beekman.)

XQ. 79. Every doctor who performs this operation must do it for the first time; is not that correct? A. That is true.

XQ. 80. Then there is not much expectation of that resulting favorably, is there?

A. There is less expectation of it resulting favorably than with one who has had experience.

XQ. 81. And you said these were rare conditions. A. Yes.

XQ. 82. You have seen a great many of them?

A. I have not seen a great many of them myself.

XQ. 83. I thought you did testify that on your direct. A. I said I have seen some.

XQ. 84. You have operated some?

A. Oh, yes.

XQ. 85. About how many?

A. I should say ten or fifteen.

XQ. 86. This condition occurs wherever babies are born, doesn't it? [346] A. Yes.

XQ. 97. They are not all treated by New York surgeons, are they? A. No.

XQ. 88. I will ask you whether or not in your opinion there are surgeons in most good size American cities competent and skillful enough to perform this operation.

A. I want to differ with you there.

XQ. 89. All right.

A. Because—if I can qualify it?

XQ. 90. Go ahead.

(Deposition of Fenwick Beekman.)

A. Because I think there are very few men in this country who have been trained particularly in the surgery of infancy and the recognition and treatment of this condition is a rather recent development.

XQ. 91. So that a child who has this unfortunate condition and is not able to get a man from New York is taking chances, in your opinion; is that correct?

A. I do not say "from New York" to any extent. There are surgeons in other cities, such as Dr. Ladd in Boston.

XQ. 92. But, outside of the few you have mentioned, the child is taking chances; is that correct?

A. I don't know about the western surgeons as well as I do about these others. But I think that anyone is taking a chance who is operated with a man who has not had particular training in pediatric surgery. [347]

XQ. 93. All right. You have mentioned New York and Boston and I believe Philadelphia—did you? A. No, I did not.

XQ. 94. I will ask you whether or not you think that in the city of Philadelphia there is any surgeon competent to perform this operation.

A. I think there probably is.

XQ. 95. How about New Orleans?

A. I do not know anything about New Orleans.

XQ. 96. Would you say that your belief is that there is not?

A. I do not know of any man who specializes there in pediatric surgery.

(Deposition of Fenwick Beekman.)

XQ. 97. Let me ask you, doctor, for my own information: what is pediatric surgery?

A. The surgery of infancy. Pediatricians look after children.

XQ. 98. If a case of this kind occurs in a city like New Orleans, Los Angeles, San Francisco, or St. Louis, wouldn't you think there was a man there competent and skillful enough to take care of it?

Mr. Schmidt: I object to that, as to form.

A. I would not say that there were men there who were as competent to look after the case as one trained particularly in the surgery of infancy.

XQ. 99. But you know that those cases do occur in those cities,—all cities of the United States—do you not?

A. They do. Not very many; but they do. [348]

XQ. 100. Somebody takes care of them?

A. Not always. Many of them die without ever being taken care of.

XQ. 101. I suppose that some of them die even when they are taken care of carefully by these eminent men? A. They do.

XQ. 102. All right. Now, doctor, getting back to the amount to be charged: assume a competent, skillful, experienced surgeon of New York of the rank of Dr. Donovan being called to Tucson; he spends two days going, coming and performing the operation. A. What operation?

XQ. 103. The operation involved in this case; and is paid \$500 travel expense and \$2,000, that is,

(Deposition of Fenwick Beekman.)

at the rate of \$1,000 a day: do you say that that is insufficient?

A. I would say that that was insufficient.

XQ. 104. Now would you give me the reasons for that, doctor?

A. First of all, you said he is being paid at the rate of \$1,000 a day. The time consumed is only one factor.

XQ. 105. I do not want to quibble on the time factor. Let us assume that his fee was \$2,000 and he took only two days, and he was paid \$500 as travel expense; that in your opinion would not be sufficient? A. It would not.

XQ. 106. Then let us have your reason? [349]

A. Because Dr. Donovan is an outstanding man in the treatment of this condition.

XQ. 107. And you do not think \$1,000 a day is sufficient compensation for a man of Dr. Donovan's standing?

A. Dr. Donovan might easily lose a case here in New York City that would pay him \$5,000 or \$10,000 in that time.

XQ. 108. In other words, you reckon the value of his services not alone by what he actually did, but also by what he might not have done if he had not been called in that case?

A. I do; and his skill.

XQ. 109. You do not suppose that Dr. Donovan, who performs a great many of these operations, gets \$10,000 to \$15,000 for each one he performs, do you?

(Deposition of Fenwick Beekman.)

A. Not for each one he performs, no.

XQ. 110. He gets a great deal less in some cases, doesn't he?

A. He gets a great deal less in some cases.

XQ. 111. Then if he performed an operation of this character out of town—two days out of town—you would say that because he was away from his office for two days, regardless of any other factor he would be justified in charging from \$10,000 to \$15,000 because he might have lost a case in his office?

Mr. Schmidt: I object to that as to form, on the ground that it is based upon conclusions that are not present here, and no proper foundations were [350] laid for the facts set forth in the question.

The Witness: Please read the question over.

(XQ. 111 repeated by the reporter.)

A. No.

XQ. 112. Well, you do not take into consideration as a factor in forming your opinion as to the value of Dr. Donovan's services that he should be paid for what he did not do while he was away as well as for what he actually did?

The Witness: Let me have that again repeated.

(XQ. 112 repeated by the reporter.)

A. No; not what he did not do; but that he was not on call in his office or in the hospital during that period.

XQ. 113. If he performed an operation of the same degree of seriousness in New York, do you

(Deposition of Fenwick Beekman.)

think he would be entitled to be paid, in addition to the reasonable value of his services, something for the time that he was not in his office on call?

A. He is on call while he is in the operating room performing the operation in New York City.

XQ. 114. But that is not an answer to my question, doctor. An operation takes some time, does it not? A. Yes.

XQ. 115. And while the surgeon is operating you do not think he is entitled to charge something for what he might have gotten in the way of business while he was per- [351] forming that operation?

A. That is all taken into consideration in the fees.

XQ. 116. All right. That helps me a little.

Now let us get back to this other question. I would like to have you state again what factors you take into consideration in forming your opinion of the reasonable value of another surgeon's services.

A. You would like to have me——

XQ. 117. State again what factors you take into consideration in forming your opinion of the value of another surgeon's services.

A. I take into consideration his time; I take into consideration his education; I take into consideration his knowledge; I take into consideration his experience; I take into consideration the individual finances or income of the individual he treats.

XQ. 118. And the factor of the doctor's knowl-

(Deposition of Fenwick Beekman.)

edge and experience, how do you arrive at your own knowledge of that fact?

A. By the results that he has presented to the profession through his scientific papers and the wisdom in which he is held for the work he has done.

XQ. 119. Does membership in a surgical society, in your opinion, constitute a factor?

A. It is a factor.

XQ. 120. Does the fact that he has written a chapter in Christopher's Textbook of Surgery amount to a factor [352] in your estimation in considering the value of his services?

A. It shows his experience.

XQ. 121. How about Nelson's Looseleaf Surgical Service: Do you take that into consideration as a factor?

A. As a part of his experience.

XQ. 122. In the hypothetical question put to you, you were asked to assume as follows:

"* * * that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters

(Deposition of Fenwick Beekman.)

from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns, that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position [353] by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision * * *:

Now, that would not be understood by the average man, would it? A. No.

XQ. 123. It would not be understood by a jury, would it?

A. No, I do not think so.

Mr. Schmidt: I object to that, as to form. It is calling for a conclusion. There may be a doctor on the jury.

XQ. 124. That is all technical medical language, is it not? A. I should say so, yes.

XQ. 125. And, reduced to plain English, it means that the infant child involved in this case

(Deposition of Fenwick Beekman.)

had an intestinal obstruction due to a kink or a twisting; is that right? A. No.

XQ. 126. Well?

A. The infant child in this case had an intestinal obstruction due to a kinking *of* a twisting of any abnormally developed intestine. [354]

XQ. 127. An abnormally developed intestine?

A. Yes.

XQ. 128. Do you know anything about the other abnormality of his intestine?

A. What other abnormality?

XQ. 129. In other words, I tried to translate this into plain language and you corrected me by saying that I did not correctly do so, because the child had other abnormal conditions. A. Yes.

Mr. Schmidt: I object to that question. It is not based on any foundation at all; and it states facts that were not brought out by that answer.

Mr. Berdeau: Dr. Beekman understood me. I said I read a quotation or an extract from the hypothetical question; and I asked him if that in plain English did not mean that this child suffered from an intestinal obstruction due to a kink or twisting.

Mr. Schmidt: And he said No.

Mr. Burdeau: I understood his answer to be that that was not the whole meaning of it: that the child suffered from some abnormal condition of the intestine: Is that correct?

The Witness: That is correct.

XQ. 130. And, whatever abnormal conditions

(Deposition of Fenwick Beekman.)

you have in mind, are embodied in these technical terms? [355] A. Absolutely.

XQ. 131. Is that right? A. Absolutely.

Mr. Burdeau: That is all.

Redirect Examination

By Mr. Schmidt:

RDQ. 132. You stated before that you have performed those operations for nothing?

A. Yes.

RDQ. 133. You stated before you have performed those operations for \$300? A. Yes.

RDQ. 134. In either of those cases were you asked to take an airplane to Tucson, Arizona?

A. I was not.

RDQ. 135. In either of those cases were you asked to leave the city? A. I was not.

RDQ. 136. In either of those cases were you told that money was no object? A. I was not.

FENWICK BEEKMAN, M. D.

Subscribed by Fenwick Beekman before me this 17th day of December, 1941.

[Notarial Seal] ALBERT GERBER

Notary Public, New York County No. 307. Cert.
filed in Kings County No. 38. Commission expires March 30, 1943. [356]

Mr. Allen: Plaintiff will rest, then, your Honor.

Mr. Robertson: Now, your Honor, I am going to produce the testimony of Mr. Jeffcott and some tes-

timony of Mrs. Jeffcott, and I will have the testimony of at least three local surgeons and physicians who will testify in connection with the matter of the reasonableness of the charge, and I am perfectly willing to go ahead with Mr. Jeffcott, if you think anything might be facilitated by it. It is close to noon, and if it is your intention to stop at twelve, I don't think we can do much.

The Court: Could you complete your examination of Mr. Jeffcott by twelve-thirty or a quarter to one?

Mr. Robertson: I probably could, yes.

The Court: Then let Mr. Jeffcott take the stand. [357]

DAVID C. JEFFCOTT

one of the defendants herein, was called as a witness in behalf of defendants, and having been first duly sworn according to law to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Mr. Jeffcott, you are one of the defendants in this action? A. Yes, sir.

Q. When did you first come to Arizona, Mr. Jeffcott? A. In the early part of 1936.

Q. For what purpose?

A. To recover from tuberculosis of the lungs.

(Testimony of David C. Jeffcott.)

Q. And upon your coming to Arizona, were you required to live quietly or did you live an active life?

Mr. Allen: I object to that.

The Court: It is a preliminary question.

A. I was forced to lead a very inactive life.

Mr. Robertson:

Q. On or about that time, Mr. Jeffcott, did you receive [358] any gift from your father?

A. Yes, sir, in 1935.

Q. What date?

A. I believe it was in the early part of December.

Q. And could you estimate roughly the size of that gift or the amount of it?

A. I think it was between seventy-five and one hundred thousand dollars.

Q. And what was the nature of the gift, stocks, bonds, securities or of what nature?

A. Stocks.

Q. Did you have any property of your own prior to the time that gift was made?

A. Nothing of any consequence, sir.

Q. Were you married at that time?

A. Yes, sir, I was.

Q. And Mrs. Elsie Jeffcott was your wife and still is? A. Yes, sir.

Q. And from that gift did you pay your living expenses thereafter? A. Yes, sir.

Q. Was the income adequate or was it necessary to use some of the principal?

(Testimony of David C. Jeffcott.)

A. It was necessary for me to use some of the principal.

Q. Did you have any other business of any kind?

A. After I became ill, I was not able to work.

Q. When did you first acquire an interest in the ranch [359] you now have?

A. I made a down payment in December, 1936.

Q. And when did you actually get possession of the property?

A. The first of November, 1937.

Q. Now, the ranch, when you purchased it, did it have any cattle on it?

A. No, sir, it did not.

Q. What was the general condition of the ranch as to whether it was in good or bad condition?

A. I would say that it was in an extremely run down condition.

Q. And you took possession of it in the latter part of 1937?

A. Yes, sir.

Q. From whom did you purchase that property?

A. From the Chiricahua Ranches Company.

Q. What was the total consideration you paid for the ranch alone without any stock?

A. Fifty thousand dollars.

The Court:

Q. How much?

A. Fifty thousand dollars.

Q. Was that for the ranch itself?

(Testimony of David C. Jeffcott.)

A. Yes, just the bare ranch.

Mr. Robertson:

Q. Have you any brothers?

A. I have an older brother.

Q. Is he also engaged in the ranching business in this state? [360]

A. He is working on a ranch at the present time.

Q. After you took over the property, just tell the court what you undertook to do during the next year; that would be the year of 1938.

A. May I change that to start in 1937?

Q. Yes.

Q. Because, while I did not get possession of the ranch until late in 1937, we were permitted to go on the property and make certain improvements during that summer, the summer and fall of 1937. It was necessary first to provide adequate living quarters for my wife and child; to provide living quarters for the ranch and farm hands I would need; to repair extensively the fences; to build barns of adequate size to handle the type of cattle we wished to have on the ranch; to work up farming lands, which we saw as a very good opportunity of helping the ranch make an income, and which had in the older days been worked to some extent, but during the time the ranch was held by the Chiracuhua, I imagine it had not been used for anything.

Q. You mean the farm lands?

(Testimony of David C. Jeffcott.)

A. Yes, the farm lands, and then of course we had to stock with cattle. We were forced to buy from the Chiracuhua Ranches Company cattle. The Forest Service forced us to buy cattle from the Chiricuhua Ranches Company from an entirely different range, because the Chiricahua would not sell us the cattle that were on the ranch at that time.

[361]

The Court: I take it that this testimony is for the purpose of showing the financial condition of the parties a year or two years later.

Mr. Robertson: That is correct, your Honor.

The Court: At the time of the operation?

Mr. Robertson: Yes, sir.

A. That purchase of cattle, the original stocking cost me—I do not mean the original stock, but the primary stocking—the first cattle we bought came on the ranch in the fall of 1937. However, as I recall, there were only something like three hundred and fifty head of cattle, which is far from sufficient to make an adequate income for almost anybody. Also in 1937, we bought forty-two head of Registered Hereford cows and two registered bulls from Wyoming, to raise our own range bulls and thereby save the continued cost of purchasing range bulls to take care of our commercial cattle.

Mr. Robertson:

Q. Just more or less give us the high spots of the development of the ranch, say, up until June of 1939. [362]

(Testimony of David C. Jeffcott.)

A. In the fall of 1938, we purchased additional range cattle to bring on the ranch, to put on the ranch. That constituted our entire purchases in our commercial herd. In the fall of 1938, we purchased some additional registered cattle from the Greene Cattle Company, old cows, which we figured on keeping one year and get one calf from them and then sell them. Of course it was necessary to buy horses, farm machinery, lots of barbed wire, new posts, and a multitude of things that cost money, and there is no way of getting around it.

Q. Did you incur any expense in rehabilitating the farm land?

A. In buying the ranch and making those improvements and necessary improvements in almost all cases, I used up all of my own money, the money given me in 1935, or stocks that had been given to me, and I was forced to borrow additional money from my father.

Q. Did you have an arrangement with your father as to borrowing sufficient money to get the ranch on a productive and earning basis?

A. Yes, sir, from the beginning it was an understanding that my father was willing to help me to a certain extent in trying to get started.

Q. By helping you, do you mean giving you money or loaning it to you?

A. Loaning it to me. However, that was not set up in a businesslike manner until the early part of 1939, when the [363] amounts became increas-

(Testimony of David C. Jeffcott.)

ingly high, and I think it was about August of 1939 that, at that time, we had worked up and signed a mortgage on the ranch, chattels and everything we had, in favor of my mother.

Q. Prior to the time you actually executed the note and secured it by a mortgage, did you have any arrangement or understanding with your father that that would eventually be accomplished?

A. Oh, yes, sir.

Q. As soon as you determined the necessary amount of money to start the ranch?

A. Yes, even when it was set up, those additional loans were set up in there, covering the following eighteen months or two years, even after the mortgage was signed.

Q. The mortgage, as I understand it, was executed when?

A. To the best of my knowledge, it was approximately the early part of August, 1939. We had been working on it for eight or ten months previous to that.

Q. You say your mother is the mortgagee?

A. Yes, sir.

Q. What are the provisions of that mortgage as to the amount of money to be charged as interest?

A. Three and one-half percent per year.

Q. Do you know, Mr. Jeffcott, whether or not that is in keeping with the interest charged by the Federal Cattlemen's Loan Bank? [364]

Mr. Allen: Object to that as immaterial and hav-

(Testimony of David C. Jeffcott.)

ing no bearing on the issues in this case. This does not enter into the picture. I fail to see the relevancy of it.

The Court: The interest on the obligation is three and one-half per cent?

Mr. Robertson: I propose to show it is the same rate of interest he would have to pay someone else not connected with his family. Mr. Allen brought the family relation into the case, and I want to show this is a strictly business arrangement, and not a gratuitous this—a businesslike arrangement for the repayment of this money.

The Court: The bona fides of the transaction would not be based on some other concern loaning money at the same rate.

Mr. Robertson: Except as to the operating expenses of his ranch and the reasonableness of the rate.

The Reporter: (Reading)

Q. Do you know, Mr. Jeffcott, whether or not that is in keeping with the interest charged by the Federal Cattlemen's Loan Bank? [365]

The Witness: I think counsel means the Farm Land Bank, which is a part of the United States government.

Mr. Robertson: That is correct.

A. The answer is yes. The mortgage was set up following the provisions of the mortgages of the Federal Land Bank.

Q. Does it provide for an amortization of the

(Testimony of David C. Jeffcott.)

principal in keeping with the requirements of the Federal Land Bank?

A. Yes, sir, it does.

Q. What are the provisions for amortization of the principal of that loan?

Mr. Allen: That is objected to as immaterial, if your Honor please.

The Court: This pertains to the loan that is on this property?

Mr. Allen: Objected to on the further ground that the mortgage is the best evidence and speaks for itself. I do not object to his outlining his condition, but if he is going into the details of a mortgage, I object on the ground that it is not the best evidence. [366]

Mr. Robertson:

Q. I shall simply ask you a general question, Mr. Jeffcott, or, rather, I think you have already testified the mortgage provides for amortization of the principal? A. Yes, sir.

Q. When did you first set up your books on a permanent basis in connection with your ranch operation?

A. They were audited by the same firm of auditors that worked out this financing proposition, on June 30, 1939.

Q. June 30, 1939?

A. That was the date of their audit.

Q. Do you have accurate and complete records for the years of 1937, 1938 and the first half of 1939?

(Testimony of David C. Jeffcott.)

A. The records are accurate, I believe, but it is difficult to put them on the same plane as my records for the second half of 1939, 1940 and 1941, because of the nature of the accounting system at that time.

Q. I will ask you if you have made a search of the records you have for 1938 and 1939, 1940 and 1941? A. Yes, sir.

Q. Can you state your gross earnings, or gross receipts, for the year 1938?

Mr. Allen: I object to this on the ground the record is the best evidence. He testified he has a complete and accurate record. [367]

Mr. Robertson:

Q. Mr. Jeffcott, do you have any memorandum that you have prepared yourself from your account books and records? A. Yes, sir.

Q. And are these figures taken from the original books or entries? A. Yes, sir.

Q. And you have prepared this memorandum yourself? A. Yes, sir.

Q. Have you it with you?

A. Yes, sir.

Q. Using that memorandum to refresh your recollection will you state your operating income for 1938?

Mr. Allen: I object to the use of a memorandum here, secondary evidence, when it is apparent here that the primary evidence is available.

Mr. Robertson: It is not available. This witness

(Testimony of David C. Jeffcott.)

has first-hand information, and has a memorandum he has prepared himself from those books of record, and it is absolutely competent to prove such a state of facts.

Mr. Allen: I think the rule is if a witness desires to refresh [368] his memory, he may refer to the entries made at the time the transaction occurred, and not from notes prepared thereafter.

The Court: If the witness knows personally what his income has been, he may specify.

Mr. Allen: He is asked to refer to some secondary evidence and give it.

Mr. Robertson: I said for the purpose of refreshing his recollection.

The Court: The objection is good on the grounds urged by counsel. If this witness can testify irrespective of the books what his income was, he may do that.

Mr. Robertson:

Q. Do you have knowledge of what your income was for the year 1938?

Mr. Allen: I object to the further reference to this secondary evidence, this memorandum, if he is going to refer to it or if he has referred to it.

The Court: The books, as a matter of original records, should be [369] here.

Mr. Robertson: Very well. I at this time move for an adjournment until Monday morning at which time we will produce the original books.

Mr. Allen: May I suggest we continue the

(Testimony of David C. Jeffcott.)

examination to the hour indicated by the court.

Mr. Robertson: I think that as an attorney before this bar, I certainly have the right to present my case in the order I may select. It may not be the best, but I prefer it that way, and I ask that we adjourn until ten o'clock Monday morning.

The Court: I indicated earlier that we would recess over to Monday morning.

Thereupon, the court was recessed to convene again at ten-fifteen o'clock in the forenoon on Monday, February 2, 1942; and, at said time, the trial of the case was resumed, with the same appearances as heretofore noted, and the following further proceedings were had.

[370]

ROBERT C. JEFFCOTT

resumed the stand for further examination, and testified as follows, on direct examination:

Mr. Robertson:

Q. Mr. Jeffcott, handing you a document marked Defendants' Exhibit A for Identification, will you please state what that is?

A. This is a summary of the figures taken from my books, being details of each of the extensions and individual items.

Q. Do you have the original records with you in court? A. Yes, sir.

(Testimony of Robert C. Jeffcott.)

Q. This is a recapitulation of totals taken from these books? A. Yes.

Mr. Robertson: I request the witness be permitted to use Defendants' Exhibit A for Identification in connection with his testimony, for the purpose of explaining his testimony.

The Court: The original books are present and will be available?

Mr. Robertson: Yes.

Mr. Allen:

Q. Who made the recapitulation, Mr. Jeffcott?
[371]

A. I did.

Q. You made that yourself? A. Yes.

Q. You compared these figures to your original books?

A. Yes, they were prepared from those books, and checked against those books.

Mr. Allen: No objection to using the summary.

The Court: Very well.

Mr. Robertson:

Q. Can you state what your income was, Mr. Jeffcott, from ranch sales for 1938?

A. Yes, sir, thirty-seven hundred fifty-eight dollars and thirty-seven cents.

Q. Did you have any increase in cattle inventories as of that date, or for that year?

A. Increases from purchases only; no natural increase.

(Testimony of Robert C. Jeffcott.)

Q. Do you keep your books on a cash or accrual basis?

A. In 1937 and 1938, and I think 1939, they were kept on a cash basis.

Q. Do the figures on Exhibit A carry forward the totals of the accrual then?

A. Yes, sir, inasmuch as there was no natural increase in our cattle inventories during 1937 and 1938, they show in 1939, and from then on. [372]

Q. So, for the year 1938, can you state the total income from sales of cattle, together with your natural increase, of which you say you had none?

A. \$3758.37.

Q. And what were your ranch expenses for that year? A. \$18,330.74.

Q. What loss did you have from your operations of the ranch for that year? A. \$14,572.37.

Q. Did you receive any dividends during that year?

A. Yes, I received dividends in the amount of \$403.22.

Q. And will you please state what were your personal expenses for that year?

A. \$15,572.72.

Q. Was any portion of that personal expense for income taxes? A. Yes, sir.

Q. And how did it happen you were required to pay an income tax for that year?

A. I was forced to sell my stocks, those I had remaining, to pay for the ranch and its equipment.

(Testimony of Robert C. Jeffcott.)

Q. And the tax that was assessed was assessed on what basis?

A. The tax was assessed on the difference between the cost to my father or to myself, as the case might have been, and the sale price.

Q. But all of the money received from the sale of those stocks was invested in the ranch, I think you testified? [373]

A. Yes, on the ranch or to help pay our personal expenses.

Q. Can you explain why your personal expenses reached such a high total that year?

Mr. Allen: I object to that as immaterial. I do not see that the reasons for the personal expenditures in 1938 would throw any light on the situation for the court.

The Court: The witness may answer the question.

Mr. Robertson:

Go ahead, Mr. Jeffcott, just briefly.

A. That was our beginning year in the cattle business and the books were not properly set up, and a great deal of ranch expense found its way into our personal expense account.

Q. What were your ranch purchases?

A. You mean for that year?

Q. Yes. A. \$13,362.64.

Q. In 1939, what was your income from ranch sales? A. \$6183.61.

Q. Was there an increase in your cattle inventory for that year? A. Yes, sir.

(Testimony of Robert C. Jeffcott.)

Q. What did that increase amount to?

A. \$10,749.21. [374]

Q. So your total of increase from cattle inventory and income amounted to what?

A. \$16,932.82.

Q. What were your ranch expenses for that year?

A. For 1939? \$17,362.91.

Q. And what loss do your books show for that year?

A. \$430.09.

Q. What were your personal expenses for 1939?

A. \$12,983.47.

Q. Can you explain in what way that came about?

A. Yes, sir, our normal expenses since then have run approximately six thousand dollars, between six thousand and sixty-five hundred dollars. The difference was caused principally because of Robert Crawford Jeffcott, II.

Q. You mean for medical and hospital expenses?

A. Yes.

Q. Included in that was the twenty-five hundred dollars paid to Dr. Donovan?

A. Yes, sir.

Q. For the year 1940, what was your income from ranch sales?

A. \$11,548.06.

Q. And your increase in cattle inventories amounted to what?

A. \$3,010.04.

Mr. Allen: I would like to interpose an objection at this time that the year 1940 and subsequent years are not material to [375] the issues of the case, in that the obligation was incurred in 1939, and the fee was determined in 1939, and the finan-

(Testimony of Robert C. Jeffcott.)

cial circumstances of the Jeffcotts in 1939 are material, but of subsequent years is not material.

Mr. Robertson: If the court please, one of the most important questions in this case is the true financial condition of Mr. Jeffcott. We find from the testimony that he started purchasing the ranch in 1937. In 1938 he completed his cattle purchases and was getting his ranch on a paying basis. It is my purpose to prove to the court that this cattle ranch was not a plaything, but an actual business enterprise, and I can state to the court that the figures for 1940 and 1941 will be for the benefit of Dr. Donovan. During the first four years of operation of the ranch, it was impossible for Mr. Jeffcott to have any true income. He started in with a plan of five years, during which time he would build up his herd, and sell only his old stock, and at the end of that time he will have a going concern, and will be making a few thousand dollars of actual profit. I do not want it to appear that because he had losses in 1938 and 1939 it is evidence that this business venture, wherein he has all of his money invested, is a plaything, but that it is in fact a business venture.

The Court: I think, of course, the point here in this matter is [376] the financial condition of the defendants at the time this obligation was incurred.

Mr. Robertson: That is true.

The Court: Go ahead with the examination. If it is not material, I can disregard it.

(Testimony of Robert C. Jeffcott.)

Mr. Robertson:

Q. For the year 1940, what was your income from ranch sales? A. \$11,548.06.

Q. And what was your increase in cattle inventories? A. For 1940, \$3,010.04.

Q. And what was the total increase and income for that year? A. \$14,558.10.

Q. How much were your ranch expenses for 1940? A. \$16,341.60.

Q. And your losses amounted to how much for that year? A. \$1,783.50.

Q. What dividends did you receive?

A. \$130.00.

Q. And your personal expenses for the year 1940 were what? A. \$6,305.32.

Q. In other words, Mr. Jeffcott, your personal expenses—in fact, they are kept separate and apart from your ranch books? [377]

A. Yes, sir. They are kept in the ranch books, but kept entirely separate. There is no connection between them.

Q. In 1941 what was your income from ranch sales? A. \$16,585.34.

Q. In 1941, what was your increase in cattle inventories? A. \$9,574.82.

Q. What was the total of that increase and income? A. \$26,160.16.

Q. What was your 1941 ranch operating expense? A. \$27,491.49.

Q. And your losses for that year amounted to how much? A. \$1,331.33.

(Testimony of Robert C. Jeffcott.)

Q. Did you receive any dividends in 1941, and if so how much?

A. \$90.00 I received in dividends.

Q. What did your personal expenses amount to in 1941? A. \$6,277.82.

Q. And now, in connection with 1942, from present indications, assuming that the market stays approximately at its present level, are you able to make any estimate as to what your net profit from ranch operations may amount to this year?

A. Yes, sir, it looks very favorable that we will make between five and eight thousand dollars, net profit, on the ranch.

Q. And your personal living expenses, can you estimate what they will amount to?

A. To the present time, they are going to be a little bit lower, except as this case may turn out.

Q. So it has been your plant, Mr. Jeffcott, to keep building [378] up your herd to the maximum range capacity, and in the beginning, how long did you anticipate that would take you?

A. I took courses at the University of Arizona, and at that time we were informed that to start in the cattle business it would be five years before there would be any income at all. I also got information from several qualified men who said it would be approximately five years before there was any return.

Q. During this time, has it been necessary for you to increase the amount of your mortgage?

(Testimony of Robert C. Jeffcott.)

A. Yes, to buy additional cattle and take care of necessary living expenses, add other things to the ranch and keep it operating.

Q. Can you tell me, as of June, 1939, the amount of the mortgage and the appraised value of your property, or the inventory value?

A. I should like to refer to my books for that.

Q. Very well.

A. July 1, 1939, my equity in the ranch was \$79,613.91.

Q. How did you arrive at your equity? Give us the amount of your mortgage and your inventory value.

A. The amount of the mortgage as of that same date was \$69,500.00. The auditors at that time figured that the value of my equity in that ranch at the end of 1942 would be \$110,500.00, not including the value of the land and fences, forest permits and buildings, which [379] would have a book value of approximately \$100,000.

Q. Now, can you give us the present amount of the mortgage and your present inventory value of the property?

A. At the present time the mortgage on the ranch amounts to \$128,292.37, with my equity at \$57,667.19, and the total assets on the ranch amounting to \$199,900.26.

Q. During the year of 1939 and the years of 1940, 1941, and up to the present time, did you have any other source of income whatsoever?

(Testimony of Robert C. Jeffcott.)

A. None other than has been mentioned, from the dividends.

Q. Which amounted to?

A. In 1939, it amounted to \$130.00; in 1940 I got \$130.00, and in 1941, it amounted to \$90.00. Excuse me, sir. I believe there was one point—I do not remember the year—when I had \$25 more from my services as a trustee on a trust which had nothing to do with me. I was merely a trustee.

Q. Were you one of the beneficiaries under the trust? A. No, sir.

Q. Prior to 1939, what experience had you had in paying medical fees to doctors in New York City?

A. My personal experience has been very limited.

Q. Well, for yourself or members of your family that you have actual personal knowledge of the amount of fee paid, and the nature of the operation.

A. I remember an operation that my father was forced to have—I think it was in the year 1934—when he was operated on [380] for fistula of the anum, or some such thing. He was operated on three different times during his stay in the hospital, from four to six weeks, by the man who had been chief surgeon to the King of Belgium.

Q. Do you know what hospital he was connected with in New York?

A. Presbyterian Medical Center.

Q. Do you recall the name of the doctor?

A. No, sir.

(Testimony of Robert C. Jeffcott.)

Q. Do you know the amount of the fee he charged for the three operations?

Mr. Allen: I want that answer "yes" or "no", because I wish to make an objection.

A. Yes, sir.

Mr. Robertson:

Q. Will you state that amount?

Mr. Allen: I object, your Honor, as being an isolated instance, and throwing no light on the issue before the court whatsoever.

Mr. Robertson: It is a field of inquiry opened up by the plaintiff's counsel in his original examination of Mr. Jeffcott as to what his experience had been in paying fees to doctors in New York. [381]

Mr. Allen: I do not think, if the Court please, I examined the witness as to what fees he might have paid, but as to what he knew of the customs in and around New York as to charges for services of surgeons in that locality. That is one thing, but what one surgeon might have charged for a series of three operations is another thing. He might have given the operations to defendant's father or might have charged one hundred dollars, and that would throw no light on whether or not this witness is acquainted with the custom of New York surgeons. It is an objection that goes to every question that seeks to prove knowledge of an isolated case.

Mr. Robertson: It is the only way in the world that one could get information.

The Court: Of course the operations were not comparable. One was on an adult and the other on

(Testimony of Robert C. Jeffcott.)

the intestines of an infant a few days old. The question may be answered.

A. One thousand dollars.

Mr. Robertson:

Q. For the three operations.

A. For the three operations.

Q. What other experience or knowledge do you have as to fees [382] charged by New York surgeons.

A. My mother was operated on within the last two years, presumably for breast cancer, by a doctor in New York.

Q. What was his name?

A. Dr. Auchincloss.

Q. And was the breast removed in the operation?

A. No, sir. That is the reason I said "presumably". The doctor spent a great deal of time determining whether it was or was not a breast cancer. There was an operation done which I understand was very severe, but the nature of the operation I cannot tell.

Q. What was the charge for that?

Mr. Allen: Same objection. It has no comparable bearing on any issue in this case. It is an attempt to prove by isolated instances general knowledge, and furthermore it has no bearing upon the specialized service provided here and no relation to the examination of this witness on cross, under the rule, because of the fact that he was there interro-

(Testimony of Robert C. Jeffcott.)

gated as to the custom on the part of an eminent specialist.

The Court: The question may be answered.

A. Three hundred and fifty dollars.

Mr. Robertson:

Q. Do you have any other knowledge as to fees charged by [383] New York surgeons?

A. I have no other knowledge that I could be sure of, sir, among New York surgeons.

Q. Mr. Jeffcott, can you tell us what fees you paid for the services of Dr. Thompson?

Mr. Allen: If the court please, I object to that as immaterial. It has no bearing on any issue in this case.

The Court: Yes, I think the objection is good. I have been inclined to allow a good deal of latitude, but I think that is not material.

Mr. Robertson:

Q. For the sake of the record, what fee did you pay to Dr. William D. Carrell?

Mr. Allen: Same objection.

The Court: Objection sustained.

Mr. Robertson:

Q. What fee did you pay Dr. Vivian Tappan for consultant services?

Mr. Allen: Same objection. [384]

The Court: Same ruling.

Mr. Robertson:

Q. What fee did you pay Dr. Victor M. Gore for his services?

(Testimony of Robert C. Jeffcott.)

The Court: You are speaking of physicians that treated the infant in this case?

Mr. Robertson: They were all in attendance.

The Court: At the same illness?

Mr. Robertson: Yes, the same illness.

The Court: What is your objection, Mr. Allen?

Mr. Allen: In the first place, it is wholly immaterial what he expended on the infant in connection with this operation or the illness or the surgical condition of the infant, in that it can have no earthly bearing upon the reasonableness of the charge in issue before the court. The witness has testified that he expended during that ear something in the neighborhood of six thousand dollars in- [385] cident to that illness on the part of the infant child, of which twenty-five hundred was paid to this plaintiff.

The Court: It might be material to this extent, in the matter of determining how much of the outlay in connection with the operation was for fees of physicians—it might have some bearing.

Mr. Allen: I make one further objection. I object further that the witness having testified to that extent, can only seek to testify as to the items paid to these various local physicians or surgeons as having a bearing on the fee charged by this plaintiff. Since he has testified as to the total, it can only be for the prejudicial purpose of making a comparison. None of them are shown to be specialists, but are shown to be otherwise, and none were

(Testimony of Robert C. Jeffcott.)

called here from some other field of practice. In view of that situation, I object because it is an effort to make a comparison between the fees charged by local physicians and the fee charged, but not paid to the specialist in the case.

Mr. Robertson: All of these objections go simply as to the weight.

Mr. Allen: I want the objection in the record. [386]

The Court: The question may be answered. I think your position is correct, Mr. Allen, but the additional expense in connection with the illness or mal-formation of this baby and all of the expense attending that may be material. For that reason, I will permit the witness to go ahead.

Mr. Robertson:

Q. Going back, Mr. Jeffcott, will you state what fee was paid to Dr. William D. Carrell for services performed in connection with the illness of the baby and for the delivery of the baby and continuing services after that?

A. As a total, two hundred dollars.

Q. And what fee was charged by the Desert Sanatorium for the services of Dr. Hugh Thompson?

A. Dr. Thompson's services are included in the price of the room. There is no separate charge for the doctor.

Q. What fee did you pay to Dr. Victor Gore?

A. Forty dollars.

(Testimony of Robert C. Jeffcott.)

Q. And to Dr. Vivian Tappan?

A. Two hundred dollars.

Q. For how long a period of time, beginning with the day of the birth of the child, did Drs. Thompson, Gore and Tappan render services on behalf of the child, or to the child?

Mr. Allen: Now, I make the same objection, on the ground it is for the purpose of establishing a prejudicial comparison. [387]

Mr. Robertson: Every element that went into this matter and the consideration these various doctors gave to the financial condition of these parents, are elements that enter into the conditions surrounding this case. Mr. Allen seems to have in mind that Dr. Donovan is the only specialist in the only line of medicine where they have a specialty, and therefore evidence on his line is the only evidence admissible in this case. The law is that the opinion of anyone who knows anything concerning the general nature of this operation, taking into consideration the ability of the doctor, his experience, his skill, his standing, the time he had to devote to this case, the nature of the operation, and all of those matters go into the determination of the case, and Dr. Gore and Dr. Carrell will be called to testify here as to their opinion as to whether or not the fee is reasonable.

The Court: The last question was how much time each of these physicians gave to the baby since the operation?

(Testimony of Robert C. Jeffcott.)

Mr. Robertson: Yes, to show the reasonableness of their charge.

Mr. Allen: Certainly that is the purpose, and that is what makes it prejudicial. He cannot attempt to show the state of mind of three or four local physicians by the testimony [388] of this witness. That is a very novel theory indeed. The question was not the time they spent on the operation, but the time they spent for the fees they charged. In other words, it is that effort to make a comparison which I think is highly prejudicial.

Mr. Robertson: It certainly is, because I shall show the qualifications of these men and in their particular line it will closely approximate that of Dr. Donovan, and I intend to show the time they spend in attendance upon that baby, and the fees they charged.

The Court: Objection sustained.

Mr. Allen: Furthermore, the matter of the original fee can only be introduced in two ways—upon the knowledge of someone who observed the service, or the opinion of some expert.

The Court: The ruling has been made, Mr. Allen.

Mr. Robertson: Very well, you may cross-examine. [389]

Cross Examination

By Mr. Allen:

Q. Now, as I understand it, Mr. Jeffcott, you got your start in this cattle ranching business pri-

(Testimony of Robert C. Jeffcott.)

marily from a seventy-five thousand dollar gift from your father in 1935. Is that correct?

A. Yes, sir.

Q. In other words, that gift provided you with the primary funds from which you initiated that ranch program?

A. The primary funds might have been our small savings account.

Q. And if that were true, then the secondary fund was your father's gift. Is that what you mean?

A. I don't think it makes a great deal of difference.

Q. That is what I thought. Then you started out there originally with a program of development on this cattle ranch and as you needed money in the course thereof, you secured it from one or both of your parents, did you not, Mr. Jeffcott?

A. Yes, sir.

Q. And, as you have testified on direct here, aside from some very small amounts of dividends which you received during the past four or five years, all of the money that you have spent has come from your parents, other than these sales from the ranch which you mentioned?

A. I believe it was brought out in my testimony the first day that I had also borrowed from the bank. [390]

Q. And who repaid the banks, if anyone?

A. The banks are still carrying the loan.

Q. What is the amount you owe the banks?

(Testimony of Robert C. Jeffcott.)

A. Five thousand dollars open account.

Q. And the rest of your indebtedness at the present time then consists of \$128,000, in round figures, that you owe your mother. Is that correct?

A. Yes, indebtedness on the ranch.

Q. And it is true, is it not, that prior to the time Dr. Donovan's bill was mailed to you and received by you, you had no mortgage on that property in favor of either your mother or your father?

A. That statement is correct; however, we had started work long before that baby was born, on a set-up that would be satisfactory to everybody concerned.

Q. Now, how much interest have you paid to your mother since you placed the mortgage on your ranch in her favor?

A. It would be three and one-half per cent since the mortgage has gone into effect to my mother, and previous to that, there was interest to my father at the rate of five per cent.

Q. And the manner in which it has been paid is to increase the total amount of the indebtedness?

A. I have paid them—actually, of course, I have had to borrow in addition to take care of the ranch expenses, of which that would be one, to augment by cattle sales.

Q. In other words, these living expenses—I withdraw that. [391] The personal expense of \$12,983.47 in 1939, approximately \$15,000 in 1938, in excess of \$6,000 in 1940, and in excess of \$6,000 in 1941, so

(Testimony of Robert C. Jeffcott.)

far as that actual cash is concerned, came to you and you were able to expend that by virtue of further advances by your parents. That is correct, is it not?

A. Yes. It is a little hard to know which pocket it came out of, but that is the truth of it.

Q. That is the point I wanted to make clear, Mr. Jeffcott.

A. I also want to add that since August, for the first time since I have been in that business, I have had to borrow no further money.

Q. Had you had the occasion, in the development of this ranch program, or your living expenses, or your ranch expenses, to need further funds, you assume, do you not, that you might have further increased your mortgage indebtedness to your parents?

A. I suspect there comes an end to all good things, sir. My father has been very generous, but he is not by any means the wealthiest man in the world, and he does get strapped once in a while.

Q. Do you anticipate that out of the \$5,000 which you expect sometime to make out of this ranch as an annual profit, during your lifetime, to retire the indebtedness of \$128,000?

A. If I live sixty-eight years.

Q. How long? [392]

A. Sixty-eight more years.

Q. What are you going to live on in the meantime?

(Testimony of Robert C. Jeffcott.)

A. I believe my letter that you are taking those figures from said the expectancy I had for the next few years was only five thousand dollars. It is our expectation that our ranch will do considerably better than that; otherwise, I wish to sell my ranch.

Q. Now, you have only one brother, have you not? A. Yes, sir.

Q. And you and that brother are heirs to a substantial fortune, are you not?

Mr. Robertson: Just a moment, if the Court please. I object to the question for the very obvious reason that Mr. Jeffcott's father is under no legal obligation whatsoever to leave his money to Mr. Jeffcott and his brother or either of them, and Mr. Allen's supposition is remote.

Mr. Allen: I withdraw that, but I want to add an explanation, or I want to say in resistance to the objection that it all goes to the true financial condition of this witness, and his true financial position. Counsel for the defense and the defendant have dwelt at great length on that subject, and I want to go into that further picture as indicated by the attitude of his parents who set him up in a ranching business of approximately two hundred thous- [393] and dollars. He says if he lives sixty-eight years, he may pay back the present \$128,000.

The Witness: Plus interest.

Mr. Allen: I want to go into the question of the possibility he might not have to pay it back.

Mr. Robertson: The possibility is admitted.

(Testimony of Robert C. Jeffcott.)

The Court: This relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, is due for advances on the mortgage, is the relationship of father and son, isn't that all?

Mr. Allen: I withdraw the question in order to save time in the matter.

The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other [394] purpose, all right.

Mr. Allen: No, I just thought it had some connection with the financial condition of the defendant which is in issue here.

Q. Now, Mr. Jeffcott, by the early part of 1938, you had this ranch program planned and under way? That is correct, is it not?

A. The early part of 1938, sir, even though I had studied at the University of Arizona trying to equip myself to handle this job, in the early part of 1938 I had only been in it two months and it is difficult to say I had planned it. I had a general idea.

Q. You had set the goal of accomplishment at that time? A. Yes, sir.

Q. And, having that goal established, then on or about the 31st day of March of that year, you be-

(Testimony of Robert C. Jeffcott.)

came confronted, did you not, with a very serious condition on the part of your new-born son?

A. I believe you stated 1938 as being the goal year.

Q. I said March, 1939.

A. Yes, quite a problem.

Q. That was the situation that confronted you there when you were forced to decide what you were going to do for the alleviation of what you appreciated and realized to be a very serious condition on the part of your infant son? [395]

A. Are you speaking about the human element rather than the financial element at this time?

Q. Yes, sir. A. Yes.

Q. At that time, March 31, 1939, you had a more complete understanding of what was ahead of you in your ranch program than you had had the year before? A. It was bound to be so.

Q. And notwithstanding that situation you employed Dr. Donovan to come here from New York City to perform the needed operation, without making any negotiations in advance as to the fee. Is that correct?

A. I believe I have already testified to the fact that when Dr. Thompson asked me if money was any consideration or object—I do not remember the word—I replied to the effect that of course not, within reason; that it should not cost more appreciably to have the doctor come here than to take the baby, doctor and nurse in an airplane to New York City.

(Testimony of Robert C. Jeffcott.)

Q. And you also testified, that you might have made those statements to Dr. Thompson, but you were sure you had them in your mind. That is true, is it not?

A. I suppose, after four years or three years it is very difficult for one to know exactly what word he did use.

Q. And didn't it occur to you that in negotiating for Dr. Donovan's employment, you were seeking this rather unusual and special service when you changed your mind [396] and asked that arrangements be made for him to come to Tucson rather than you to go to him?

A. No, that did not occur to me as being particularly unusual. I had heard of many cases happening and I had also had some idea as to that I presumed such services were worth, what the doctor's fees might be.

Q. And you negotiated that employment arrangement without it ever occurring to you that you should either ascertain what it was going to cost you, or pay reasonably what it was worth?

A. My time was very limited, Mr. Allen, in that proposition. I was entirely in the hands of men who knew what they were doing. I knew nothing whatsoever about that. It is really quite disheartening when a doctor lets you down that way. I am not referring to Dr. Donovan but to the doctors who gave me the advice. Those doctors knew my situation thoroughly.

(Testimony of Robert C. Jeffcott.)

Q. And of none of those doctors did you make any inquiry as to what the fee might be?

A. I have testified to what I believe I told Dr. Thompson.

Q. But if you did make that statement to Dr. Thompson, that covers whatever inquiry or statement you may have made as to the fee?

A. Perhaps when you have a baby in that condition you are not quite compos mentis.

Q. I appreciate that, but please give an answer to the question. Let us put it this way: That if you did make [397] that statement to Dr. Thompson, then all you did with reference to a determination of what it was going to cost you was just that statement?

A. Yes, sir, in that limited time, yes.

Q. And you stated in one of your letters to Dr. Donovan now in evidence, when you sent him a check for twenty-five hundred dollars, that you were sending that to relieve your conscience. Isn't that correct?

Mr. Robertson: I suggest the witness be shown the letter, if the Court please.

The Court: All right.

Mr. Allen: I refer to the second page, final paragraph, of Plaintiff's Exhibit 3 in evidence.

A. Shall I read it?

Q. Yes.

A. (Reading) "I feel very unhappy that any question of cost should enter into what you did for

(Testimony of Robert C. Jeffcott.)

our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot [398] help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it, I would like to do some more for you in order that you would think as well of us as we did toward you." Yes, sir.

Q. In other words, your payment was made out of regard, apparently, from that letter, for the consciences of your wife and yourself in that regard?

A. In which regard?

Q. In regard to the consciences of yourself and your wife.

Mr. Robertson: I submit that the entire paragraph is very clearly and lucidly written, and I think it speaks for itself without digging out any one word out of the entire sentence.

The Court: The witness may answer the question.

A. I think "consciences" in that sentence refers to not having paid Dr. Donovan anything on that account at a previous date.

Mr. Allen:

Q. And since you have paid him twenty-five hundred dollars, you have had no qualms of conscience about his charge?

(Testimony of Robert C. Jeffcott.)

A. May I make it clear, Mr. Allen, that we very much appreciated, and still appreciate, what Dr. Donovan did for [399] our child, but to people of our means, when you receive a bill through the mail for \$12,500.00 it really comes up and slaps you in the face, and at first you think "Gee, are we completely crazy", and as you come to think of it more, you begin to inquire from other people, because everyone's decision are based, as a rule, upon talking it over and getting other peoples' ideas. I have talked it over at considerable length, and we find now that our consciences should be clear.

Q. In other words, having discussed it to your satisfaction, you feel that you have fully paid for the services which you received?

A. Yes, sir, I do.

Q. That is what I wanted to know. Now, you had talked it over before you referred it to a relative of the family in New York hadn't you?

A. You mean talked over the——

Q. You had carried on these conversations to attempt to determine what you should regard as a reasonable fee? A. That is right.

Q. And did you give this relative of yours any instructions as to what amount he should offer in attempting to settle this difference with Dr. Donovan?

A. As I recall, sir, I did not. I believe that I kind of put it in his hands with the full understanding of the case and the things that were involved

(Testimony of Robert C. Jeffcott.)

in that, and I don't think I ever told him any figure. [400]

Q. Then you did not instruct him to negotiate with Dr. Donovan on the basis that one thousand dollars was all that you could rake and scrape together under the circumstances?

A. I think Dr. Hamblin was very well acquainted with our circumstances.

Q. You did not instruct Dr. Hamblin to deal with Dr. Donovan on the basis that a total of one thousand dollars was all you could rake and scrape together under the circumstances?

A. No, sir, I did not.

Q. Then, if Dr. Hamblin negotiated with Dr. Donovan on that basis, it was not the result of your instructions? A. That is correct, sir.

Q. Now, with reference to Dr. Donovan's offer to settle this matter with you for \$7500.00, it is true, is it not, that at the time he made that offer to you he advised you he would then settle for \$7500.00 if you paid it immediately?

A. You mean that Dr. Hamblin advised me that if we paid Dr. Donovan immediately it would be all right?

Q. Yes.

A. Yes, I believe that that advice came through at some later date following the conversation.

Q. Dr. Donovan, in other words, in connection with that \$7500.00 offer, made it plain to you that the offer was made if he could get an immediate or early settlement [401] of the matter?

(Testimony of Robert C. Jeffcott.)

A. It is quite some time since I have had an opportunity to refresh myself on that letter, sir, but I believe that is correct.

Mr. Allen: No further cross, your Honor.

Re-direct Examination

By Mr. Robertson:

Q. Mr. Jeffcott, the gentleman who saw Dr. Donovan in New York on your behalf, I believe was a doctor himself, wasn't he? A. Yes, sir.

Q. You say you did not suggest the figure of one thousand dollars? A. No, sir, I did not.

Q. So far as you know, then, the figure of one thousand dollars was his own idea as to the reasonable value of these services?

A. Yes, sir, so far as I know.

Q. Now, just what did you think this fee would probably amount to?

Mr. Allen: Just a moment. I object to that, your Honor. In fact, that has been up once before in this case and the objection was sustained. [402]

Mr. Robertson: I appreciate that fact and know the Court's ruling was against me, but on the matter of what Mr. Jeffcott had in mind and why he did not exert himself to get hold of Dr. Donovan more than he did, his answer is perfectly admissible, not as evidence as to the reasonableness of the fee, but to explain his conduct as to why he did not insist upon a more definite arrangement.

The Court: The court has read over that question here earlier in the record, and I don't think it

(Testimony of Robert C. Jeffcott.)

has any bearing at all on determining the reasonableness of the fee.

Mr. Robertson: I concede that entirely because that has to be established by expert testimony and the relationship of the party has been brought out.

The Court: The objection will be sustained.

Mr. Robertson:

Q. In connection with this mortgage that is held by your mother, Mr. Jeffcott, does it have a provision that enables you to prepay the principal payment?

A. Yes, sir, that can be paid off just as rapidly as I am able to. That is the understanding.

Q. Does your mother exact partial release of that mortgage [403] if you sell any cattle?

A. Yes, sir, she does.

Q. And the mortgage is of record, is it?

A. Yes, sir.